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

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| **HUSEIN ODOBASIC** | : | |
| | : | **HEARING NUMBER:** 14B-UI-07758 |
| Claimant, | : | |
| | : | |
| and | : | **EMPLOYMENT APPEAL BOARD DECISION** |
| | : | |
| **MASTERBRAND CABINETS INC** | : | |
| 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 ALLOWED IF OTHERWISE ELIGIBLE**

The Claimant appealed this case to the Employment Appeal Board. Two members of the Employment Appeal Board reviewed the entire record. The Appeal Board finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

**FINDINGS OF FACT:**

Husein Odobasic (Claimant) worked for Masterbrand Cabinets, Inc. (Employer) as a full-time material handler from January 12, 1998 until he was fired on June 27, 2014. The Claimant suffered a work related back injury on February 3, 2014. His physician restricted him to lifting no more than fifteen pounds and pushing no more than twenty pounds. The Claimant was not improving and the workers' compensation carrier obtained some video surveillance of the claimant on two days. During these days the Claimant had been involved in working on some projects. The Employer has failed to prove that the Claimant's activities on these days exceeded his restrictions.

On June 25, 2014, the Employer met with the Claimant and asked about activities that exceeded his limitations, and the Claimant denied any. The Employer terminated the Claimant on June 27, 2014, based on the Employer's belief that the Claimant had failed to follow the doctor's restrictions and had been untruthful during the meeting on June 25, 2014.

**REASONING AND CONCLUSIONS OF LAW:**

Iowa Code Section 96.5(2)(a) (2014) 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.

"This is the meaning which has been given the term in other jurisdictions under similar statutes, and we believe it accurately reflects the intent of the legislature." *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d, 445, 448 (Iowa 1979).

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).

The findings of fact show how we have resolved the disputed factual issues in this case. We have carefully weighed the credibility of the witnesses and the reliability of the evidence. We have found credible the Claimant's evidence that he did not knowingly violate his restrictions. While the Employer presented some testimony it claims shows otherwise, that evidence was insufficient to carry the Employer's burden. The Employer claims to have a video of the Claimant lifting and moving certain items. We must take the Employer's word for it because it is not in the record, and even the Claimant has not seen it. This video, as described by the Employer, allegedly shows the Claimant carrying a sink, jumping from a truck, lifting

some shingles, and pushing a door. While the Employer claims to be able to tell how much the sink and the door weigh it is obviously pretty tricky to guess how heavy something is based on how heavy it *looks* on video. Some sinks are heavier than others, and so with doors. The Claimant suggests that the video would typically not be of high quality and, being surreptitious, would be from a distance. We refuse to so speculate, but we do observe that the Employer had the burden of laying a foundation for the clarity of the video – clarity, not just image size - or of entering the video into evidence, and this was not done adequately.

As for the jumping, jumping does not involve lifting and we see no jumping restriction mentioned. Further, there is now way to tell how much the shingles weighed, and the Claimant attorney's point that scrapped shingles are not put in "packets" is well taken. Thus with shingles we have some unspecified number of shingles each of an indeterminate weight, yielding no reliable way on this record to make a determination that the Claimant was indeed violating his restrictions. Indeed the Employer's evidence was that there were a number of activities that it would "not be a hard assumption to think that that would be more than 15 pounds." Of course we do not traffic in assumptions, hard or otherwise. We require proof, and applying the usual legal standards for evaluating the weight of the evidence we find that the Employer has failed to prove that the Claimant committed disqualifying misconduct by exceeding his restrictions.

The Employer also claims misconduct based on lying to the Employer about activities. But the Employer's queries, as described by the Employer, were all qualified by the 15 pound limit. So the Employer did not ask "Did he work on any projects?" but rather, "If he had done any projects that would have exceed the 15 pound threshold?" (Recording at 16:55-17:13). The Claimant's negative responses were thus only false if the Claimant had engaged in such projects (and other activities) exceeding his restrictions, and if the Claimant was aware that he had exceeded his restrictions. Since the Employer has not proven that the Claimant exceeded restriction the Employer has even less proven that the Claimant knew he was exceeding his restrictions. Indeed, even if we were to conclude that the Claimant in fact exceeded his restriction, we would still find credible the Claimant's assertion that he did not *know* that he was exceeding his restrictions, thus meaning we was not *willfully* committing misconduct.

Finally, solely for the edification of the parties, we point out two things. First, "[a] finding of fact or law, judgment, conclusion, or final order made pursuant to this section by an employee or representative of the department, administrative law judge, or the employment appeal board, is binding only upon the parties to proceedings brought under this chapter, and is not binding upon any other proceedings or action involving the same facts brought by the same or related parties before the division of labor services, division of workers' compensation, other state agency, arbitrator, court, or judge of this state or the United States." Iowa Code §96.6(4)(emphasis added). This provision makes clear that unemployment findings and conclusions are only binding on unemployment issues, and have no effect otherwise. Second, if the Claimant collects temporary disability benefits under the Workers' Compensation law those benefits would offset any unemployment on a dollar-for-dollar basis for the weeks in question. 871 IAC 24.13(3). The parties, the Employer especially, should make sure to inform Iowa Workforce of any such Workers' Compensation benefits which may serve as an offset to unemployment benefits which may now be payable to the Claimant.

**DECISION:**

The administrative law judge's decision dated August 21, 2014 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was discharged for no disqualifying reason. Accordingly, the Claimant is allowed benefits provided the Claimant is otherwise eligible.

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Kim D. Schmett

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Ashley R. Koopmans

RRA/fnv