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

DOUG D CROOKS	:	
	:	**HEARING NUMBER:** 15B-UI-05352
Claimant	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
	:	
DARLING INTERNATIONAL 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, 730.5

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. The members of the Employment Appeal Board reviewed the entire record. A majority of the Appeal Board, one member dissenting, finds it cannot affirm the administrative law judge's decision. The majority of the Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

Doug Crooks (Claimant) worked for Darling International Inc. (Employer) full-time where he helped to load out the finished product. The Claimant worked for Employer from January 9, 1989, until his employment ended following a positive drug screen for marijuana after a work-related accident on January 28, 2015. The Claimant was fired because of this positive drug test result.

On January 28, 2015 the Claimant was helping a truck driver pull a tarp over the truck. At about 1:30 p.m., the Claimant fell off a platform or catwalk, sustaining injuries. He was transported by ambulance to the emergency department at a local hospital. (Exhibit Cl-A) He remained at the hospital until January 30, 2015. (Exhibit Cl-B, pg. 11).

On January 28, 2015, as part of the medical treatment for his injuries, the Claimant provided urine specimens. These urine specimens were screened for drugs and other pertinent data. (Exhibit Cl-B).

A urine specimen was collected at 5:15 p.m. on January 28, 2015. This urine specimen was listed as "none detected" for cannabinoids, also commonly known as marijuana. This urine specimen was "none detected" for all the listed and tested drugs. (Exhibit Cl-B, pg. 7, 27).

A different urine specimen was collected around 1 a.m. on the morning of January 29, 2015, to be tested in accordance with the Employer's policy. This urine specimen was tested for drugs. The drug test report for this urine specimen was positive for marijuana. This test result was provided to the employer. (Exhibits Cl-D, pg. 2; E2). The results of this drug screen were provided to the Claimant in writing delivered by certified mail, return receipt requested. (Exhibits E1, E2; Cl-D) The Claimant was offered a split sample test. (Exhibit E1) He declined this opportunity.

The Claimant provided a urine specimen on February 19, 2015, which was negative for marijuana. (Exhibits Cl-E, Cl-G)

The credible testimony of the Claimant established that he had not used marijuana for 11 years. The Claimant has undergone other random drug tests at his employment. All of these drug tests were negative. The Claimant did not use any drugs on or around January 28, 2015. The Employer has not proven by a preponderance of the evidence that the positive drug test result of January 29, 2015 was an accurate result.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2015) 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).

This case turns on our resolution of the factual issue of whether the positive test result was a false positive. Thus it is not necessary to address issues about the Employer's compliance with the myriad requirements of §730.5, even assuming that those requirements applied in cases where an employee enters into an agreement that includes as a condition of continued employment no further positive drug test results. *See* Iowa Code §730.5(10)(a)(1); *Reigelsberger v. EAB*, 500 N.W.2d 64 (Iowa 1993); *Anderson v. Warren Distribution Company*, 469 N.W.2d 687 (Iowa 1991). Rather, the key is the finding that the test result was not shown to be accurate, and the application of the law of misconduct to this state of facts.

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 drug tests showing that the Claimant had not used marijuana (or related substances), and the testimony of the Claimant denying any such use. Specifically, we find that the positive drug test offered by the Employer lacks credibility, and have thus concluded that there is no credible proof that the Claimant in fact used illegal drugs in violation of his last chance agreement. The situation in a nutshell is that we are faced with three choices: 1. The positive test is correct and the prior hospital test is false, or 2. The negative hospital test is correct and the subsequent positive is false, or 3. Both tests are correct and the Claimant somehow ingested THC in between the two. For obvious reasons, we do not find it credible that the hospitalized and injured Claimant somehow ingested marijuana after he was tested *at the hospital.* In finding the hospital test reliable we, first of all, note that a hospital has strong incentive to have accurate testing as lives can be at stake. Second, we have the credible testimony of the Claimant denying any marijuana use. Third, we have the subsequent test, albeit some weeks later, showing a negative result. Putting together these factors the most reasonable conclusion is that the Employer has failed to prove by a greater weight of the evidence that the positive test result was accurate.

With this conclusion we address whether a positive drug test result is *itself* misconduct. We note that the rehire agreement in paragraph 8 states "[i]n the event that you ever test positive on a subsequent drug or alcohol test, following expiration of this Conditional Reinstatement Agreement, your employment with the Company will be terminated." (Ex. E3). Naturally this cannot be taken to mean that a false positive drug test result alone can constitute misconduct. Clearly misconduct requires a willful and wanton disregard of the Employer's interests through either deliberate action or repeated carelessness. The Employer has failed to prove that the false positive here is the result of anything done by the Claimant whether deliberate or careless. True, carelessness may have caused the injury, and the injury caused the drug test, and the existence of a drug test is a predicate to a false drug test. But we do not think that any potential negligence in getting injured is a proximate cause of any false positive – there being far too many superseding causes in between – so that we could find that any negligence caused either a false positive or the termination. Besides, any negligence would have to be repeated.

That being the case, we are left with a termination based on a false positive drug test result. In as much as the Claimant is not responsible for that false result, he cannot be found to have committed misconduct merely by testing positive. *Ordinarily*, of course, we disqualify on a positive result, but that is because *ordinarily* we conclude that the positive result shows that the claimant violated the employer's substance abuse policy. But "*ordinary*" is not the word for this case. In short, a false positive drug test result is not competent proof of drug use, and thus cannot support a finding of misconduct.

Finally, solely for the edification of the parties, we point out that "[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.

DECISION:

The administrative law judge's decision dated June 23, 2015 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.

_____
Ashley R. Koopmans

_____
James M. Strohman

DISSENTING OPINION OF KIM D. SCHMETT:

I respectfully dissent from the majority decision of the Employment Appeal Board; I would affirm the decision of the administrative law judge in its entirety.

_____
Kim D. Schmett

RRA/fnv