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

SCOTT R SANDS	:	
	:	**HEARING NUMBER:** 15B-UI-00350
Claimant	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
MAGELLAN MIDSTREAM HLDGS GP	:	
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. The 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:

The Claimant, Scott R. Sands, worked for Magellan Midstream Holdings, GP from January 4, 2006 through December 12, 2014, initially as a station operator. Beginning in April of 2014, the Claimant worked as a full-time terminal operator. (8:15-8:57; 21:46-22:05; 32:00) The Claimant was responsible for pre- and post-inspection of railcars by following proper procedure to ensure all fittings are tight prior to shipment of a given load. (11:46-12:31) He did this with the use of a pre-inspection checklist. Several terminal railcar operators trained Mr. Sands on how to load and unload the railcars; each operator did pre-inspection and post-inspection differently. (41:23-42:32)

The Employer issued a final warning to the Claimant back on April 25, 2014 for having previously experienced difficulty following procedures as a station operator; this happened during his early training period for terminal operator. (20:35-20:45; 28:25-28:55; 32:16-32:18; 40:41-41:16)

On October 1, 2014, Mr. Sands completed the pre-inspection check list for a railcar. (14:14) When he checked the welded piece on the safety bolt, it worked properly. (24:32-24:58) He didn't tighten the safety bolts on the bottom of the railcar because it hadn't been a part of his training, and none of the other operators ever checked these bolts. (22:40-22:58) The railcar did not pass inspection. Unbeknownst to the Claimant, the rail yard had erroneously parked an ethanol railcar in the oil railcar location, which resulted in Mr. Sands' accidently putting oil in the ethanol railcar. (25:25-25:48) He and the other terminal operators had to subsequently empty the car and undergo additional training. The Claimant was not disciplined. (32:28-32:36)

On October 7, 2014, the Employer gave additional, updated training for its 3 operators to clarify in writing the pre-inspection procedures since there was confusion among them. (17:35-20:08; 23:05-23:33; 24:29-24:42; 23:11-23:35; 26:17-27:17; 32:43-32:50; Exhibit 1) They were never told to tighten the safety bolts on the bottom of the railcar. (47:42-47:54) The Employer conducted additional training throughout the company the following week. (27:20-27:45; 43:20; Exhibit 3)

On December 3, 2014, the Claimant loaded a railcar; performed the pre-inspection and completed the check list according to how he had been trained (35:11-35:23; 45:26-45:45), i.e., tightened the safety bolts on the manway cover, etc. (33:18-33:30; 36:34-36:44) The Claimant saw no leaks at that time. (33:34-33:36) The following day, his supervisor informed him that there was a leak. (34:17-34:34) The Claimant explained what he thought happened, i.e., there was ice inside the railcar above the bolt underneath, which he did not see the night before during pre-inspection. (47:19-47:22) The Employer made no mention of discipline or termination. (35:34)

About two weeks later (December 12, 2014), the Employer terminated Mr. Sands for unsatisfactory job performance, i.e., failing to follow company procedure. (9:18-9:24; 9:47-10:00; 10:50-11:00; 22:07-22:28)

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2013) 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.

The Iowa Supreme court has accepted this definition as reflecting the intent of the legislature. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665, (Iowa 2000) (quoting Reigelsberger v. Employment Appeal Board, 500 N.W.2d 64, 66 (Iowa 1993).

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 attribute more weight to the Claimant's version of events.
The Claimant was an 8-year employee whom both parties agree received a final warning regarding his performance in April of 2014, nearly 8 months prior to his actual termination. We note that that warning reflected his performance in his previous position as a station operator as opposed to his most recent position as a terminal operator for which he had received no warnings. As such, we conclude that the April 2014 warning is too remote in time to merit a significant bearing on the final act that led to his termination.

871 IAC 24.32(8) provides:

> *Past acts of misconduct.* While past acts and warning can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

Although the Employer argues that the Claimant failed to properly perform a pre-investigation check on October 1, 2014, causing a railcar to fail to pass inspection, the Claimant provided an unrefuted account of why the railcar did not pass. (25:25-25:48) Initially, the incorrect placement of the railcars contributed to the error that caused the railcar to be emptied. The Employer did not deny Mr. Sands' testimony that he received no disciplinary action for this incident, and in fact, the record supports that the Employer essentially acknowledged that there was confusion regarding pre-inspection process. We conclude these facts mitigate culpability on the Claimant's for the October 1st incident.

As for the December 3rd incident that led to Mr. Sands' termination, the Claimant provided credible testimony that he performed the inspection in the manner he had been taught by other terminal operators including his most recent training. On the night of his inspection, there was no visible sign of leakage. Mr. Sands provided a cogent explanation for how the leak occurred, and why he didn't detect it the night

before. (33:37-33:47) Apparently, there had been water in the bolt, which caused the bolt to expand. The ice melted over the course of the next 12 hours, which in turn, caused the gap, hence the leak. (33:15-33:55; 46:34-46:59) The Claimant did not see the ice; had he seen it, he would have adjusted his inspection accordingly. At worst, this could be considered poor judgement on the Claimant's part; however, it does not rise to the legal definition of misconduct.

And even if we concluded that it was misconduct, the Employer waited nearly two weeks to terminate him. Again, the Claimant's termination must be based upon a current act. The court in Greene v. Employment Appeal Board, 426 N.W.2d 659 (Iowa App. 1988) held that in order to determine whether conduct prompting the discharge constituted a "current act," the date on which the conduct came to the employer's attention and the date on which the employer notified the claimant that said conduct subjected the claimant to possible termination must be considered to determine if the termination is disqualifying. Any delay in timing from the final act to the actual termination must have a reasonable basis. Here, the Claimant was told of the leak on December 3rd. The Employer issued no disciplinary measure against him. There is no evidence to support that there was any type of investigation going on to justify the delay, nor did the Employer inform him that his termination was pending. For this reason, we conclude that the delay was unreasonable, and the Employer has failed to satisfy its burden of proving that the Claimant was terminated for a current act of misconduct.

DECISION:

The administrative law judge's decision dated April 13, 2015 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was discharged for no disqualifying reason. Accordingly, he is allowed benefits provided he is otherwise eligible.

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_____
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AMG/fnv
DATED AND MAILED_____

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