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

WAYNE H RUBE Claimant, and AMERICAN ORDNANCE LLC Employer.	:	HEARING NUMBER: 08B-UI-03945 EMPLOYMENT APPEAL BOARD DECISION

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 DENIED

The employer 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:

Wayne Rube (Claimant) worked for American Ordnance (Employer) as a full-time mechanic from April 20, 1992 until his discharge on March 19, 2008. (Tran at p. 2; p. 10). The Claimant was suspended and given a last chance agreement on October 17, 2007 for smoking and having a cigarette lighter in an explosive area. (Tran at p. 3; Ex. 1). He was warned that additional discipline would result in his discharge. (Tran at p. 3; Ex. 1).

On March 5, 2008 the Claimant was observed by three co-workers entering an area where the wearing of hardhats is mandatory. (Tran at p. 2-3; p. 4). Failure to follow mandated safety procedures will,

under the Employer's policies, trigger discipline. (Tran at p. 3; p. 11). The Claimant had arrived at the building

in question without a hardhat then entered, approached a co-worker, and asked for the co-worker's hardhat. (Tran at p. 4-5; p. 11; Ex 1). The co-worker declined to remove the (mandatory) hardhat from his head and give it to Claimant. (Tran at p. 11; Ex. 1). The Claimant then chose to remain in the hardhat area and accompany other employees through the area for about 20 minutes rather than leave to retrieve a hardhat of his own. (Tran at p. 5-6; p. 7; p. 9 [hats available]; p. 10; Ex. 1). The Claimant was aware at the time he walked through the area in question that he needed a hard hat and that he did not have one on. (Tran at p. 5; p. 6; p. 7; p. 10-11; p. 13; Ex. 1). He was told on March 5 that he was being considered for possible discipline over the incident. (Tran at p. 11). He was terminated on March 19, 2008 for his willful disregard of safety procedures on March 5. (Tran at p. 2; p. 10).

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2007) provides:

> *Discharge for Misconduct*. If the department finds the individual has been discharged for misconduct in connection with the individual's employment:
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> 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 law limits disqualification to current acts of misconduct:

> *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.

871 IAC 24.32(8); accord Ray v. Iowa Dept. of Job Service, 398 N.W2d 191, 194 (Iowa App. 1986); Greene v. EAB, 426 N.W.2d 659 (Iowa App. 1988); Myers v. IDJS, 373 N.W.2d 509, 510 (Iowa App. 1985). A final warning or last chance agreement may operate to reduce the protections of a claimant as compared to other employees. Warrell v. Iowa Department of Job Service, 356 N.W.2d 587 (Iowa App. 1984). In determining whether a discharge is for a current act we apply a rule of reason. We determine the issue of "current act" by looking to the date of the termination, or at least of notice to the employee of possible disciplinary action, and comparing this to the date the misconduct first came to the attention of the Employer. Greene v. EAB, 426 N.W.2d 659 (Iowa App. 1988)(using date notice of disciplinary meeting first given).

There is no question that the Claimant's intentional decision to enter, remain, and perform job tasks in a hardhat area without required safety equipment, given his prior discipline, was disqualifying misconduct. This is especially so given that he knew his next violation would result in discharge. See Warrell v. Iowa Department of Job Service, 356 N.W.2d 587 (Iowa App. 1984)(last chance agreement). The only reason the Administrative Law Judge granted benefits was on the question of current act. We think that the delay shown in this case between the act of misconduct and the discharge was not so long that the act was no longer a "current" one under the Employment Security Law. We emphasize that the Claimant was aware that an investigation was ongoing and, from his last chance agreement, that his job was in jeopardy on the same day that the infraction took place. As the Claimant was on notice of possible termination in a timely fashion the two-week delay in arriving at a conclusion was, in this case, a reasonable one. We conclude that the Claimant was terminated for a current act of misconduct and that he must therefore be disqualified from benefits.

Finally, since the Administrative Law Judge allowed benefits and in so doing affirmed a decision of the claims representative the Claimant falls under the double affirmance rule:

> 871 IAC 23.43(3) Rule of two affirmances.
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> a. Whenever an administrative law judge affirms a decision of the representative or the employment appeal board of the Iowa department of inspections and appeals affirms the

decision of an administrative law judge, allowing payment of benefits, such benefits shall be paid regardless of any further appeal.

b. However, if the decision is subsequently reversed by higher authority:

(1) The protesting employer involved shall have all charges removed for all payments made on such claim.
(2) All payments to the claimant will cease as of the date of the reversed decision unless the claimant is otherwise eligible.
(3) No overpayment shall accrue to the claimant because of payment made prior to the reversal of the decision.

Thus the Employer's account may not be charged for any benefits paid so far to the Claimant for the weeks in question.

DECISION:

The administrative law judge's decision dated May 7, 2008 is **REVERSED**. The Employment Appeal Board concludes that the claimant was discharged for disqualifying misconduct. Accordingly, he is denied benefits until such time the Claimant has worked in and has been paid wages for insured work equal to ten times the Claimant's weekly benefit amount, provided the Claimant is otherwise eligible. See, Iowa Code section 96.5(2)"a".

No remand for determination of overpayment need be made under the double affirmance rule, 871 IAC 23.43(3), but still the Employer's account may not be charged.

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Elizabeth L. Seiser

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Monique F. Kuester

RRA/fnv

DISSENTING OPINION OF JOHN A. PENO:

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. Although I do not condone disregard of safety procedures, the Employer's delay in acting is a complete mystery. On the very day of the incident the

Claimant signed a statement that admitted that he had tried to get a hardhat (and was thus aware of the

need for one) and that he "did follow Dave Sammons around without one." (Ex. 1). That same day three other employees signed statements saying essentially the same thing about the Claimant's intentional decision not to have a hardhat on. What was left to investigate? It is true the Claimant knew that an investigation had started on March 5, but it is also true that the investigation was finished the same day. There is not just a delay from the beginning of the investigation to the decision but from the completion of the investigation to the decision. The Employer supplies absolutely no satisfactory explanation for its decision to wait to impose discipline. The Administrative Law Judge was correct to allow benefits based on the current act doctrine and I would affirm.

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John Peno

RRA/fnv