

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

JOHN D OUELLETTE

Claimant

and

TRIVIEW STEEL & SUPPLY INC

Employer

HEARING NUMBER: 17BUI-08535

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 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, one member dissenting, finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

The Claimant, John D. Ouellette, worked for Triview Steel and Supply, Inc. from May 19, 2017 through July 21, 2017 as a full-time welder. (7:22-8:11; 13:36) On July 21, 2017 (Friday), the Claimant backed up the company truck after visually surveying the area, and seeing no obstacles. He suddenly felt a "little bump," which caused him to stop and pull forward. (14:50-14:55) The Claimant thought he hit the rebar rack. He heard shouting and saw Cy Struss (a co-worker) holding Greg (another co-worker) upright. (14:57-15:11; 16:40) Greg had fallen in the path of the Claimant's truck while trying to stop the Claimant from backing in the truck driveway, and possibly wrecking it. Greg was unresponsive and Cy immediately laid him down and ran inside to call 911. (15:20-15:25; 16:50) The Claimant had not seen Greg, nor heard him shouting "stop" prior to the Claimant's checking the narrow area and proceeding to back up the truck when he accidentally hit him. (15:46-15:55; 16:16-16:60) Greg later died from his injuries. The Claimant did not have any prior accidents on the job, nor had he been issued any verbal or written warnings for driving while on the job.

The Employer directed the Claimant to go home and not to report to work the following Monday. (10:10-10:30; 14:27-14:32) The Claimant did not hear from the Employer, again, until he was told via a police officer to retrieve his tools on July 26, 2017 (13:50-13:53) and was notified by the Employer that his employment was terminated.

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).

Both parties acknowledge that the July 21, 2017 incident was a tragic accident, which we agree. The Claimant provided credible testimony that he checked the area prior to backing the truck into what he described as a tight area, which any reasonable person would have done. We also note that the Claimant was hired, principally, as a

welder and not as a professional truck driver. The Claimant demonstrated reasonable precautionary measures by having the windows down, radio off, so as not to be distracted as he maneuvered the vehicle. The fact that he did not hear Greg shouting is most unfortunate; however, it is not commensurate with a finding that he backed up intentionally or carelessly knowing that Greg was there. The record is void of any evidence to establish that the Claimant acted out of maliciousness or any intentional design to undermine the Employer, much less cause the death of his co-worker. While we certainly sympathize with the circumstances of this case, we cannot conclude that the Employer satisfied its burden of proof. At worst, we hold that this was an isolated instance of poor judgement that didn't rise to the legal definition of misconduct.

DECISION:

The administrative law judge's decision dated September 8, 2017 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.

The Claimant has requested this matter be remanded for a new hearing. The Employment Appeal Board finds the applicant did not provide good cause to remand this matter. Therefore, the remand request is **DENIED**.

The Claimant submitted additional evidence to the Board which was not contained in the administrative file and which was not submitted to the administrative law judge. While the additional evidence was reviewed for the purposes of determining whether admission of the evidence was warranted despite it not being presented at hearing, the Employment Appeal Board, in its discretion, finds that the admission of the additional evidence is not warranted in reaching today's decision. There is no sufficient cause why the new and additional information submitted by the Claimant was not presented at hearing. Accordingly all the new and additional information submitted has not been relied upon in making our decision, and has received no weight whatsoever, but rather has been wholly disregarded.

Lastly, we would note that this Employer is not a base period Employer, and therefore its account would not be charged in this matter.

Kim D. Schmett

Ashley R. Koopmans

DISSENTING OPINION OF JAMES M. STROHMAN:

I respectfully dissent from the decision of the Employment Appeal Board. I would affirm the decision of the administrative law judge by striking the last paragraph in the Reasoning and Conclusions of Law. I find that the misconduct occurred as a result of the Claimant's actions in backing up the truck diagonally in an unsafe manner, which precipitated potential damage to the vehicle. The fact that a death occurred, in and of itself, does not unequivocally establish misconduct.

James M. Strohman

AMG/fnv