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

ERIC A KOVALESKI	:	
	:	HEARING NUMBER: 07B-UI-10026
Claimant,	:	
	:	
and	:	EMPLOYMENT APPEAL BOARD
	:	DECISION
QWEST CORPORATION	:	
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. 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:

Eric Kovaleski (Claimant) was employed by Qwest (Employer) as a full-time sales consultant from July 28, 2003 until the date of his discharge on October 3, 2007. (Tran at p. 13:45-13:32; 15:39-48). On September 26, 2007, the claimant came to Telesales Manager Debra Thompson and said he was having trouble staying awake. (Tran at p. 17:15-25). She took him to a conference room where she observed him, noting he was frequently falling asleep and would not waken immediately as she came into the room. (Tran at p. 7:23-33). Under company policy she got a "reasonable suspicion" checklist and filled it out. (Tran at p. 18:00-18:15). At this time the Claimant asserted that he had taken medications that made him sleepy. (Tran at p. 18:20-33).

The results of the checklist indicated a drug screening test should be performed, and the claimant was taken to Concentra for a sample to be given. (Tran at p. 16:05-10). The Employer has not proved that the sample was split. (Tran at p. 16:35-40). The Employer has failed to prove that the Claimant was notified by certified letter, sent prior to his dismissal, of his rights to have a split sample tested at a laboratory of his choice. (Tran at p. 20:24-21:45). The sample was sent to a certified laboratory and the employer was notified of the result on October 2, 2007. (Tran at p. 18:50-19:05). The sample had tested positive for a controlled substance. (Tran at p. 15:50-55; 19:05-12).

Upon hearing that the test results came back positive Ms. Thompson called the Claimant and told him to come in for a meeting. (Tran at p. 19:20-31) The purpose of this meeting was to inform the Claimant that he was terminated. (Tran at p. 19:31-35). On October 3 Ms. Thompson held a dismissal meeting with the Claimant. (Tran at p. 19:31-35). Ms. Thompson did not at that time know what controlled substance had been detected. (Tran at p. 19:50-55). The claimant was "not surprised" and admitted he had "relapsed" and started "doing drugs again." (Tran at p. 19:41-20:02). The Employer terminated the Claimant for testing positive for drugs. (Tran at p. 14:33-15:01; Ex. 1).

REASONING AND CONCLUSIONS OF LAW:

Background: 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 Drug Test Result: We have no doubt that having a positive test result for being under the influence of drugs or alcohol while at work, in violation of the Employer's policy, would constitute disqualifying misconduct. But the Iowa Supreme Court has ruled that an employer cannot establish disqualifying misconduct based solely on a drug test performed in violation of Iowa's drug testing laws. Harrison v. Employment Appeal Board, 659 N.W.2d 581 (Iowa 2003); Eaton v. Employment Appeal Board, 602 N.W.2d 553, 558 (Iowa 1999). The Court in Eaton stated, "It would be contrary to the spirit of chapter 730 to allow an employer to benefit from an unauthorized drug test by relying on it as a basis to disqualify an employee from unemployment compensation benefits." Eaton, 602 N.W.2d at 558. Thus we must examine Iowa's drug testing statute to see if the Employer has complied with its requirements.

In pertinent part §730.5(7) provides:

> i. (1) If a confirmed positive test result for drugs or alcohol for a current employee is reported to the employer by the medical review officer, the employer shall notify the employee in writing by **certified mail, return receipt requested**, of the results of the test, the **employee's right to request and obtain a confirmatory test of the second sample** collected pursuant to paragraph "b" at an approved laboratory of the employee's choice, and the fee payable by the employee to the employer for reimbursement of expenses concerning the test. The fee charged an employee shall be an amount that represents the costs associated with conducting the second confirmatory test, which shall be consistent with the employer's cost for conducting the initial confirmatory test on an employee's sample. If the employee, in person or by certified mail, return receipt requested, requests a second confirmatory test, identifies an approved laboratory to conduct the test, and pays the employer the fee for the test within seven days from the date the employer mails by certified mail, return receipt requested, the written notice to the employee of the employee's right to request a test, a second confirmatory test shall be conducted at the laboratory chosen by the employee.

Iowa Code §730.5(7)"i"(1)(emphasis added). The record contains no evidence that the Claimant was notified by certified mail of his right to have a split sample tested at the laboratory of his choice. The mere fact that the Claimant's union ordinarily files grievances to make sure that the requirements were satisfied but did not grieve the Claimant's termination is insufficient to conclude that the requirements were followed in this case. That inference is too much of a stretch (and we note the Administrative Law Judge did not go this far either). We find that the Employer has failed to prove compliance with §730.5. The Employer has thus failed to lay a foundation for the admission of the test results into evidence and we may not consider those results. Harrison v. Employment Appeal Board, 659 N.W.2d

581 (Iowa 2003); Eaton v. Employment Appeal Board, 602 N.W.2d 553, 558 (Iowa 1999).

Result of Invalidity Of Drug Test: In the past a majority of this Board has held that failure to §730.5 only affects what evidence may be considered in an unemployment hearing. Under those rulings an allegation that misconduct was committed by a claimant is not automatically defeated simply by an employer's failure to comply with Iowa Code §730.5. Instead, those prior decisions of the Board have excluded from evidence the test results but held open the possibility that the claimant might be disqualified based on independent evidence of intoxication. Even following the reasoning in those cases, which is generally favorable to the position taken by employers, does not deny benefits to the Claimant in this particular case. We can therefore, for the purposes of this case, assume that the failure to comply with §730.5 only results in exclusion of the test results rather than automatically defeating claims of misconduct based on intoxication.

Misconduct in this case: In the past, a different majority of the Board has held that a failure to comply with Iowa Code §730.5 in administering a test for drugs or alcohol only means that the test results are excluded from evidence. The Board has even found that claimants were disqualified based on independent evidence of drug use after excluding the drug test results. In such cases, however, the employer had testified that the test results were not the sole cause of the termination. In those cases there was evidence that the fact of use would have been sufficient to cause to termination. This case is different.

Here the Employer testified that the Claimant was terminated for testing positive. The termination meeting was scheduled before the Claimant made any admissions to the Employer. The admissions, therefore, were not the reason for the termination. Under the rule developed in the prior cases, the test results would be excluded from evidence. At a minimum, the failure to comply with Iowa Code §730.5 demands this much. This leaves the Employer in the situation where the cause of the discharge is a test whose results are not in evidence.

Generally, "[t]here must be a direct causal relation between the misconduct and the discharge… Simply put, we think an employer must establish that the employer discharged the claimant because of *a specific act or acts of* misconduct." West v. Employment Appeal Board, 489 N.W.2d 731, 734 (Iowa 1992)(emphasis in original); accord Larson v. Employment Appeal Bd., 474 N.W.2d 570, 572 (Iowa 1991) (record revealed claimant was fired for incompetence; claim that she was fired for deceit was supplied by agency post hoc); Lee v. Employment Appeal Board, 616 N.W.2d 661, 669 (Iowa 2000)(incident occurring after decision to discharge is irrelevant). The burden on the Employer is to prove that the Claimant was "discharged for misconduct". Iowa Code §96.5(2)(a). The Code does not state that the Claimant is disqualified if a termination would be justified by misconduct but only if the termination was "for" misconduct. As we read this record the Employer would terminate the Claimant if and only if he tested positive on the drug test. The positive test result was necessary to the decision to terminate. With that test excluded from evidence, the Employer is left with no proof of the asserted misconduct that caused the discharge and benefits may not be denied.

DECISION:

The administrative law judge's decision dated November 15, 2007 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. The overpayment entered against claimant in the amount of $1,986.00 is vacated and set aside.

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Elizabeth L. Seiser

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John A. Peno

RRA/fnv

DISSENTING OPINION OF MARY ANN SPICER:

The employer credibly testified that Mr. Kovaleski admitted that he had a drug relapse, but did not specifically identify what type of drug he was using. Due to Mr. Kovaleski's erratic behavior, employee's self-admission and reasonable suspicion under the employer's policy a drug test was in order. As Exhibit 1 the Employer submitted the Employer's policy as it related to drug testing, their reasonable suspicion checklist and the electronic acknowledge of understanding the policy from the claimant dated March 28, 2007. The testimony and this evidence alone is enough to prove misconduct by the Claimant. Even if the drug test is excluded from evidence we still have the admission by the Claimant and the very significant observations leading to the reasonable suspicion test. Contrary to the majority I do not see this as a case where the test result is the real case of the termination. The Claimant was observed at work. Reasonable suspicion was formed. The termination decision was made because the test result confirmed the suspicion that the Claimant had been under the influence at work. He was terminated for being under the influence, as confirmed by the test, not merely for testing positive. Since the termination was for being under the influence at work there is adequate – more than adequate – proof of misconduct causing the discharge even excluding the drug test result. Based on this proof, the observations and the admissions, the Claimant should have been disqualified.

To ensure that the Employer is not reversed in the future the employer may wish to make sure the person testifying does understand the Iowa Code as it relates to the drug policy and can articulate to the Administrative Law Judge the process that the laboratory representative of the Employer followed as it related to sending the results by certified mail with the employee given an opportunity to select a split sample with a company of his choice prior to dismissal. Yet, Mr. Kovaleski failed to participate in the hearing and in a serious drug case where unchallenged first hand testimony was given by the Employer and not rebutted by the Claimant this in itself is a violation of the Employer's due process which would allow benefits when the employer has proven beyond a reasonable doubt that Mr. Kovaleski, a four year sales and service consultant, demonstrated misconduct as testified by the Employer. I am, in particular, concerned with a process whereby the Administrative Law Judge delves into the possible foundation for excluding the drug test results when the Claimant fails to appear. Normally a party offering an exhibit must lay a foundation for its authenticity and it is left up to the opposing party to object or lay a foundation for an objection. Or if the proffering party merely offers testimony all that need be shown is the fact that the testifying person has the requisite knowledge of the events and, again, it is up to the opposing party to interpose objections. Naturally where a party appears but without an attorney the Administrative Law Judges quite admirably fulfill their duties under Baker v. Employment Appeal Board, 551 N.W. 2d 646 (Iowa App. 1996) by delving into §730.5 compliance. But if the party is not there to interpose an objection I do not think that any inquiry beyond mere authenticity of the results is warranted. Where a Claimant fails to appear then if the Employer make a prima facie showing that the drug test results are authentic, i.e., they are what they purport to be, then the test result should be admitted without objection.

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Mary Ann Spicer

RRA/fnv