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

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| **STEVE R GUDMUNSON** | : | |
| | : | **HEARING NUMBER:** 13B-UI-12057 |
| Claimant, | : | |
| | : | |
| and | : | **EMPLOYMENT APPEAL BOARD** |
| | : | **DECISION** |
| **GRAY TRANSPORTATION 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

**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. Two 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 Employment Appeal Board would adopt and incorporate as its own the administrative law judge's Findings of Fact with the following additions:

The Claimant injured his ankle on Labor Day (September 3, 2012) when he got his foot caught underneath a table as he tried to grab a sharp object away from his kids. (Rec. 7:32-7:23) His ankle swelled to the size of a golf ball and the Claimant took about 1200 milligrams of Ibuprofen to cope with the pain. (6:24-6:15) The Claimant denied he had been drinking (Rec. 6:08) when he contacted Mr. Flemming to inform him that he probably wouldn't be in the following day unless he could walk. The Claimant could not walk the following day, and did not report to work.

The Claimant contacted the Employer on September 5th at approximately 2:00 p.m. (Rec. 19:05-18:53; 18:34) to report that he would be off work and the reason for the same. The Employer did not mention anything to the Claimant about John Deere looking for their freight. (Rec. 16:36-16:28)

The Claimant frequently rambles when communicating, which could be misconstrued as intoxication. (Rec. 16:22; 13:46)

**REASONING AND CONCLUSIONS OF LAW:**

Iowa Code Section 96.5(2)(a) (2009) 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).

First off, as for the Employer's allegations that the Claimant contacted the Employer in an intoxicated state, we agree with the administrative law judge's analysis that the weight of the evidence does not support the Employer's assertion that Mr. Gudmunson was intoxicated on either September 3rd or the 9th when he contacted Mr. Flemming or Mr. Thornton. We also agree that the Claimant's decision to drink alcohol while off duty would not constitute misconduct in connection with his employment absent some clear impact on the Employer, i.e., the loss of his driving privilege due to an OWI, which was not the case. In addition, the record contains no evidence to support that the Employer put the Claimant on notice that he was forbidden to contact his co-workers outside the job.

As for the Claimant's absences on September 4th and 5th, the Claimant believed in good faith that he informed the Employer of his impending absence on September 4th when he initially told the Employer of his accident the previously evening. In addition, he called the Employer on the 5th to apprise him of his condition, albeit after the start of his shift. Mr. Gudmunson provided corroborating evidence to support his visit to the doctor as well as provided the Employer with medical documentation about his injury and release from work when he reported to the September 6th meeting. This doctor note covered his absences from September 5th through the 9th. (See, Exhibit B) There is no dispute that the Claimant was off work due to illness, i.e., severely strained ankle. The court in *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982) held that absences due to illness, which are properly reported, are excused and not misconduct. See also, *Gaborit v. Employment Appeal Board*, 734 N.W.2d 554 (Iowa App. 2007) wherein the court held an absence can be excused for purposes of unemployment insurance eligibility even if the Employer was fully within its rights to assess points or impose discipline up to or including discharged for the absence under its attendance policy.

While the employer may have compelling business reasons to terminate the Claimant, conduct that might warrant a discharge from employment will not necessarily sustain a disqualification from job insurance benefits. Budding v. Iowa Department of Job Service, 337 N.W.2d 219 (Iowa App. 1983). Based on this record, we conclude that the Claimant's absences were excused within the meaning of the law. Thus, the employer failed to satisfy their burden of proof.

**DECISION:**

The administrative law judge's decision dated November 26, 2012 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.

A portion of the Claimant's appeal to the Employment Appeal Board consisted of additional evidence which was not contained in the administrative file and which was not submitted to the administrative law judge. While the appeal and additional evidence were reviewed, the Employment Appeal Board, in its discretion, finds that the admission of the additional evidence is not warranted in reaching today's decision.

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John A. Peno

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Cloyd (Robby) Robinson

AMG/fnv