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

BOBBY D YARNGO Claimant and **ARCHER-DANIELS-MIDLAND CO** Employer	:	**HEARING NUMBER:** 19BUI-05366 **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, 96.3-7

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, Bobby Yarngo, worked for Archer-Daniels-Midland Co. from February 23, 2018 through June 6, 2019 as a full-time maintenance trainee 1. During his training, it was always stressed to him that he complete whatever job he was given. The Claimant was oftentimes assigned and expected to complete two-person jobs without assistance. On several occasions, the Claimant voiced his concerns about safety issues, but his concerns were disregarded.

In the autumn of 2018, the Claimant received a couple verbal warnings for performance issues. He received a written warning and disciplinary suspension without pay in October for unacceptable behavior.

Sometime in early April of 2019, the Claimant spoke to his supervisor, Randy Keller, about his promotion for which he told was he had attendance issues. The Claimant disagreed, explaining that he had contacted the Employer via security on the days he was considered “no call/no

shows." He filed a complaint with the Human Resources office based on discrimination for the way he felt he was being treated.

Sometime during the last week in May of 2019, Mr. Yarngo met with Mr. Keller (his immediate supervisor) to, again, discuss his promotion. The two men debated about his attendance point accumulation. After the Claimant left his office, Mr. Keller immediately called him back to sign a written warning dated April 18th, 2019 for a slide gate incident that occurred several weeks prior that the Claimant had not previously been made aware.

The April 18th incident occurred after the Claimant reported to work and was directed by Dean (lead man and 30-year veteran of the company) to remove partition bearings. Once that job was completed, the Employer directed him to assist Greg in repairing a conveyor in N-11 where the job was already set up and ready for him. As the Claimant approached that area, he observed Dean working with a slide gate. Whenever the Claimant worked on a conveyor before, the slide gate was already in place in the conveyor. The Claimant had no prior training or knowledge of how slide gates are positioned in conveyors. In this case, the conveyor was malfunctioning. Greg handed Dean an incorrect slide gate to pass to Mr. Yarngo, and directed him to shut down the machine. Unbeknownst to the Claimant, it was the wrong slide gate. When he couldn't see the conveyor's underpinning after bending down, he placed the slide gate in the machine, which resulted in the conveyor cutting the slide gate within 60 seconds. Everyone in the vicinity heard the noise and gathered. It wasn't until several weeks later that the Employer issued a written warning to the Claimant for violating a safety procedure. The Claimant was unaware that an investigation had been made without his input.

On May 30, 2019, Mr. Yarngo received a job assignment to move an 82-pound steel cylinder over to maintenance (P-43), which typically required two people to accomplish. He immediately asked the foreman who was assigned to help him. The foreman told him he had to work alone. This was not the first time the Claimant was assigned to a two-person job, and was denied assistance when he requested help. The Claimant gathered his tools. He repeated his request for help, as he was concerned the equipment was too heavy for him. He was directed to get the job done. Halfway through the job, the Employer pulled him away to assist with tracking one of the conveyors. After completing the second task, the Employer directed him to return to complete the P-43 assignment.

The Claimant brought a dolly cart onto which he intended to lift the steel cylinder with the use of a strap; but it was too heavy. He was unable to move the cylinder backwards or forwards. He then checked the doorway to make sure the area was clear and safe before proceeding. He was never trained on how to move cylinders from one place to the other. Using a forklift was not an option because he would need another person to assist him, and he had already been refused such assistance. The Claimant rolled the cylinder down the stairs. No one was injured.

When the Employer saw this, the Claimant was not scheduled to work for the following week. On June 6, 2019, the Employer sent the Claimant a termination letter. The Employer would not have discharged the Claimant for this last incident; however, because he had other disciplinary warnings, the Employer felt it necessary to sever their employment relationship.

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 find the Claimant's version of events credible. The record supports the Claimant strived to perform all tasks assigned to him to the best of his ability and in keeping with the Employer's mission to 'get the job done!' Although the Employer asserts the final incident, alone, would not have warranted his termination, we find the prior acts lacked sufficient corroboration as to be considered in determining the final act, which according to the Employer's own testimony were not terminable offenses.

In looking at the allegations of excessive attendance points, and inappropriate cell phone usage, the Employer provided only one verbal warning back in September of 2018. And even if we were to consider the alleged attendance issue, alone, we note that exceeding the allotted number of points in a no-fault attendance policy is not dispositive of misconduct. 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 discharge for the absence under its attendance policy. According to Mr. Yarngo's testimony, he reported his

questioned absences to security. There is nothing in this record to establish what the reasons were for the absences at issue, and therefore it is unproven these absences were, in fact, unexcused.

The Claimant's inappropriate cell phone usage involved a single verbal warning that occurred over six months ago, and appears not to have been an ongoing issue with the Claimant. As for the October written warning and suspension, it also is too remote in time from the termination to be considered in determining whether the final act is disqualifying.
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.

Regarding the April 18th slide gate incident, if the Employer concluded the Claimant committed any wrongdoing , why was it not brought to the Claimant's attention at the initiation of, or the conclusion of the investigation, as opposed to several weeks later? Why was the Claimant not a part of that investigation? Even if we were to consider this incident as a relevant past act due to its proximity to the discharge, there were mitigating factors involved in the Claimant's culpability. The Claimant had not received training working with slide gates. He was merely following the instructions of the lead man who was 30 years his senior in performing this very task. It was the lead man who gave him the wrong slide gate that he subsequently inserted causing the damage. Thus, we cannot hold the Claimant completely accountable for this act.

Getting to the final act, we find the Claimant acted in good faith in light of the Employer's refusals to provide assistance after repeated requests. While he may have used very poor judgment, it didn't rise to the legal definition of misconduct such that he should be denied benefits. As such, his actions were an isolated incident of poor decision-making while attempting to complete a challenging assignment.

DECISION:

The administrative law judge's decision dated July 31, 2019 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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Kim D. Schmett

Ashley R. Koopmans

James M. Strohman

AMG/ss