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

CHRISTOPHER K MILLEDGE	:	
	:	**HEARING NUMBER:** 15B-UI-09990
Claimant	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
OWEN INDUSTRIES 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: 96.5-1

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

The issue of timeliness was raised on appeal when the Employer filed this appeal beyond the deadline. The Board finds good cause for the untimely appeal, and considers it as timely.

FINDINGS OF FACT:

Christopher Milledge (Claimant) worked for Owen Industries (Employer) as a full-time laser shagger starting on November 22, 2010. The Claimant signed for receipt of the employer's handbook on November 23, 2010. The handbook provided for post-accident drug testing if, among other things, the accident caused in excess of $1,000.

On July 24, 2015, the Claimant was using a crane while other employees were up in a basket 40 feet above the concrete in a different area of the building. The Claimant went outside for 10 or 15 minutes to load product. While the Claimant was gone, the employees in the basket moved into the Claimant's work area. The Claimant returned to the crane and began to work. The Claimant did not see the other workers and he

caused a collision. Had the Claimant kept an adequate lookout, he would have seen the other workers in the basket. The Claimant caused property damage of approximately $8,000.00.

The Employer suspended the Claimant on August 24, 2015, for two days while it investigated. As part of its investigation the Employer conduct a drug test under its policy. The test came back positive. When the Employer attempted to call the Claimant on over two days, the Claimant did not answer and never returned the calls. The Claimant chose to not return to work after the suspension. The Claimant voluntarily quit.

REASONING AND CONCLUSIONS OF LAW:

The Claimant Quit: Iowa Code section 96.5(1) provides:

> An individual shall be disqualified for benefits: Voluntary Quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

Generally a quit is defined to be "a termination of employment initiated by the employee for any reason except mandatory retirement or transfer to another establishment of the same firm, or for service in the armed forces." 871 IAC 24.1(113)(b). Furthermore, Iowa Administrative Code 871—24.25 provides:

> Voluntary quit without good cause. In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5.

Since the Employer had the burden of proving disqualification the Employer had the burden of proving that a quit rather than a discharge has taken place. On the issue of whether a quit is for good cause attributable to the employer the Claimant had the burden of proof by statute. Iowa Code §96.6(2). "[Q]uitting requires an intention to terminate employment accompanied by an overt act carrying out the intent." *FDL Foods, Inc. v. Employment Appeal Board*, 460 N.W.2d 885, 887 (Iowa App. 1990), *accord Peck v. Employment Appeal Board*, 492 N.W.2d 438 (Iowa App. 1992). Meanwhile, "[a] discharge is a termination of employment initiated by the employer" for cause rather than lack of work. 871 IAC 24.1(c).

It is not uncommon for employees who quit to claim that the Employer actually fired them or laid them off. In such cases even courts that allow benefits examine the actions of the employer to determine whether the employer actually did anything that could be construed to be a termination initiated by the employer. Although there is no published Iowa case on point, guidance in Iowa comes from the unpublished Court of Appeals decision in *LaGrange v. IDJS,* (Iowa App. June 26, 1984)(attached). There the employee was sent to an alcohol abuse counselor and ordered to take antabuse, a drug which makes it impossible to drink alcohol. The employee told his counselor that he planned on not taking the medication during the weekends so that he could drink. The counselor spoke to the employer about this and then relayed to the employee that his plan was unacceptable to the employer. After this the employee was at a bar where his boss was present. He bought himself a beer and one for his boss and then drank his beer. The employer did not tell the employee that he was terminated but the employee assumed that he was. The Court of Appeals ruled that the fact that the employee was mistaken about whether he would be terminated did not negate the fact that he had voluntarily quit. *LaGrange* slip op. at 5.

Cases from other jurisdictions that allow benefits in such circumstances are generally in agreement that a termination or lay off does not take place unless a reasonable person in the employee's position would conclude that he was terminated. See *e.g. Keast v. Unemployment Compensation Board of Review,* 94 Pa.Cmwlth. 346, 503 A.2d 507 (1986)(requiring that "language used by an employer possesses the immediacy and finality of a firing" before employee could recover benefits based on mistaken quit); *Goddard v E G & G Rocky Flats* 888 P2d 369 (Colo App, 1994); *Bowen v. District of Columbia Dept. of Employment Services,* 486 A2d 694 (D.C. App. 1985)(discipline/warning not a termination); *Morgan v. Unemployment Ins. Appeals Bd. 6 Cal Rptr* 2d 34 (Cal. App., 4th Dist 1992)(same); *Spatola v Board of Review*, 72 NJ Super 483, 178 A2d 635 (1962)(same). Iowa's regulation on forced quits states that a constructive discharge occurs when "[t]he claimant was compelled to resign when given the choice of resigning or being discharged." 871 IAC 24.26(1).

Here there is no evidence that the Employer actually told the Petitioner to quit or be fired. The confusion from the Employer's testimony is that apparently there was an intent to terminate but this was never communicated to the Claimant since the Claimant had decided to quit. The Claimant concluded on his own seemingly that what he had done justified termination and that he would be fired. When questioned if he was fired, the Claimant thus testified: "No. I kinda quit after that incident. I never did talk to my immediate supervisor or to Ron…" He was asked if he quit and he said "yes" and said he never had contact with anyone at the Employer following the suspension except when he went in and saw a secretary after the separation. We find that the Claimant quit.

First, the regulation on compelled quits requires something to be done by the Employer, that is, the Claimant was given the choice of resigning or being discharged. This simply did not occur here. Rule 871 IAC 24.26(1) is inapplicable. The cases in other jurisdictions all require some action by the Employer that triggers the quit. The Claimant quit *prior* to learning of the decision of the Employer and so the quit was not triggered by the actions of the Employer.

Second, the *LaGrange* case, discussed above, demonstrates that just figuring out you might get fired is not the same as getting fired. Again, in *Lagrange* the claimant was ordered to take Antabuse which would prevent his for drinking. He refused, and when he found himself in a bar with the boss, he sent a drink over. He figured he was fired and quit. But the Court of Appeals found that he had jumped the gun. Just as Mr. LaGrange's quit was not turned into a discharge by his cheekiness, so this Claimant's decision to quit – and decision it was – is not turned into a termination simply because the Claimant figured he might get fired. This is still a quit. Those cases where we have reached different conclusions, and been affirmed in the Courts, are cases where a claimant comes to the end of leave, requests *more leave*, and then is fired. *Prairie Ridge Addiction Treatment Services v. Jackson & EAB*, 11-0784 (Iowa App. January 19, 2012). Requesting leave is asking to stay, not quitting, and this case just does not fall into that fact pattern.

<u>*Quit Is Disqualifying*</u>: The disqualifying nature of the quit need not detain us long. Jumping the gun and quitting before the Employer acts is not good cause. If you are forced to quit, that is one thing, if you negligently cause an accident and are afraid you will be fired and so you decide to quit, that is ultimately a voluntary decision and not one attributable to the Employer. Moreover, whether or not the final accident is treated as misconduct, it is clearly attributable to the Claimant and not the Employer. Finally, fear about a positive drug test result and what the Employer might do as a result is similarly not attributable to the Employer. As the Court did in *LaGrange* we find this quit was not attributable to the employment. *See* 871 IAC 24.25(28)(disqualifying to quit in reaction to discipline).

Even If Termination Misconduct Is Shown: In the alternative we find that the Employer has proven misconduct. Iowa Code Section 96.5(2)(a) (2015) 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.

"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).

Although the Claimant places blame on the supervisor for the accident, it is clear that the Claimant was negligent himself, and that regardless of what the supervisor did or did not do, the exercise of ordinary care would have avoided this mishap. In addition, we have here a positive drug test. Now we are mindful that an employer needs to comply with Iowa Code §730.5 before a drug test result can be admitted into evidence.

Under the Code an employee in Iowa may be subjected to a mandatory drug test only upon certain specified conditions:

> 8. Drug or alcohol testing. Employers may conduct drug or alcohol testing as provided in this subsection:
> …
> c. Employers may conduct reasonable suspicion drug or alcohol testing.

Iowa Code §730.5(8) . Here the Employer relies on the provision allowing reasonable suspicion tests. Iowa Code §730.5(1)"i" defines "reasonable suspicion":

> i. "Reasonable suspicion drug or alcohol testing" means drug or alcohol testing based upon evidence that an employee is using or has used alcohol or other drugs in violation of the employer's written policy drawn from specific objective and articulable facts and reasonable inferences drawn from those facts in light of experience. For purposes of this paragraph, facts and inferences may be based upon, but not limited to, any of the following:
> …
> (5) Evidence that an employee has caused an accident while at work which resulted in an injury to a person for which injury, if suffered by an employee, a record or report could be required under chapter 88, or resulted in damage to property, including to equipment, in an amount reasonably estimated at the time of the accident to exceed one thousand dollars.

The Employer's post-accident policy mirrors this provision and states that the Employer can conduct post-accident testing if the damage exceeds $1,000. Here the damage was $8,000. The Claimant here clearly caused an accident resulting in sufficient damage to equipment. Thus administration of the test was justified. It is true that the Code has post-result requirements that must be met, but here the Claimant was entirely uncommunicative. It would be manifestly unjust to require the Employer to keep jumping through the statutory hoops for effecting a termination when the Claimant had effectively abandoned the job and also moved away. Under these circumstances, we do not hold the Employer to post-testing notice of right to split sample by certified mail, etc. We thus do consider and find credible the post-accident positive drug test result. Now the evidence shows that the termination was not based on the post-accident drug test alone, but that it was caused by the accident itself. But the circumstances of that accident include a positive drug test. When added to the accident itself and the Employer's drug policy, it is clear that misconduct was proven based on the accident, which included that the Claimant tested positive for drugs. We find misconduct even if we treat the case as a discharge. Benefits are denied.

DECISION:

The administrative law judge's decision dated September 21, 2015 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was separated from employment in a manner that disqualifies the Claimant from benefits. Accordingly, the Claimant is denied benefits until such time he has worked in and was paid wages for insured work equal to ten times the Claimant's weekly benefit amount, provided the Claimant is otherwise eligible. See, Iowa Code §96.5(1)"g"; §96.5(2)"a".

The Board remands this matter to the Iowa Workforce Development Center, Benefits Bureau, for a calculation of the overpayment amount based on this decision.

A portion of the Employer'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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Kim D. Schmett

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Ashley R. Koopmans

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James M. Strohman

RRA/fnv