

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

TIMOTHY R BURGER

Claimant

and

MENARD INC

Employer

HEARING NUMBER: 18BUI-12608

**EMPLOYMENT APPEAL BOARD
DECISION**

NOTICE

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

DECISION

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, Timothy R. Burger, worked for Menard, Inc. from August 22, 2018 through November 2, 2017 as a full-time laborer. The Claimant was placed on light-duty assignment beginning April 2017 as the result of a work-related injury to his back. (15:07-15:19; 18:47) His light-duty assignment involved separating reams of paper initially manufactured for a dot-matrix printer into individual sheets of paper that could be fed through a standard copier/printer. During this time, the Claimant came across approximately three pallets holding numerous old dusty boxes of paper that had gotten wet at some point, causing the majority of the paper to have been stuck together. (15:45-15:50) This caused Mr. Burger difficulty in separating the paper, and difficulty in later feeding the unstuck paper through the printer. (15:55-16:09) There was another employee on light duty who performed the same job function. (20:20-20:23) This employee had jammed a total of 30 sheets into the printer at different times, which caused the Employer to move him to another job after two weeks. (20:30-21:17)

The Claimant had been warned for failing to properly separate pieces of paper on September 1, on August 9, and back in April 2017. (19:00-19:32) The Employer suggested he slow down when separating the papers. The Employer explained that when a paper jam occurs, orders do not get printed and the assembly lines cannot complete the orders to get product out in a timely manner. Claimant was told his job was would be in jeopardy if this issue persisted. (9:15-9:31) On October 30, 2017, another paper jam occurred when Mr. Burger didn't sufficiently separate the pieces of paper causing multiple sheets (attached to one another) to be fed through the printer at the same time. Mr. Burger was terminated on November 2, 2017. For the duration the Claimant performed this job function (four months), he had fed 86,000 sheets of paper through the printer, having gotten only 6 pieces of paper jammed into the machine. (19:40-19:45)

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 Claimant was a long-term employee (approximately nine years) who was switched to a light duty assignment in April of 2017 as a result of a work-related injury. The Claimant provided credible testimony that his seemingly uncomplicated job was made difficult by the fact that he oftentimes had to feed, essentially, defective paper into the copy/print machine, which could not pass smoothly through the machine presumably because of its altered condition. He also provided unrefuted testimony that his predecessor experienced this same problem and had caused even more mistakes. That employee was not terminated, but simply moved out of the position.

We can reasonably infer that given the volume of paper (86,000 sheets) the Claimant fed through the machine during his 4-month tenure, that he worked to the best of his ability given the quality of product he had to work with. The Claimant provided unrefuted testimony that he fed only six sheets in total, which caused jams - far less than the previous light-duty employee. The record contains no evidence to support that the Claimant was negligent in carrying out his light duty tasks. Rather, it is more than plausible that even had Mr. Burger cleanly separated some of the sheets, the altered paper condition may have likely precluded its smooth passing through the copier. Lastly, the Employer failed to provide a firsthand witness to testify as to the events that led to the Claimant's termination. (13:52-14:00) Based on this record, we conclude that the Employer has failed to satisfy this burden of proof.

DECISION:

The administrative law judge's decision dated January 3, 2018 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.

Ashley R. Koopmans

James M. Strohman

DISSENTING OPINION OF KIM D. SCHMETT:

I respectfully dissent from the decision of the Employment Appeal Board; I would affirm the decision of the administrative law judge with an additional comment. The Employer has proven a pattern of carelessness by the Claimant of such a degree of recurrence as to constitute misconduct under rule 24.32(1)(a). Specifically, I would conclude that the Employer has proven a pattern of carelessness by the Claimant that is of "equal culpability" to a "deliberate violation or disregard of standards of behavior which the Employer has the right to

expect of its employees.” Applying the standards of rule 24.32(1)(a) governing repeated carelessness I would find that the Claimant’s pattern of carelessness proven on this record demonstrates negligence of such a degree of recurrence as to constitute culpable negligence that is as equally culpable as intentional misconduct.

Kim D. Schmett

AMG/fnv