



**DISSENTING OPINION OF JOHN A. PENO:**

I respectfully dissent from the majority decision of the Employment Appeal Board; I would reverse the decision of the administrative law judge. The Employer was unable to provide any specific dates as to when the Claimant had been tardy or absent to substantiate their allegation of absenteeism. (Tr. 6-7) According to the Employer's testimony, the Claimant was tardy five times in the last two months. (Tr. 7) Yet, the Employer provided no documentation or could testify as to what the reasons were for the alleged tardies to establish the tardies were unexcused. Thus, I would conclude that the Employer failed to prove by a preponderance of the evidence that the Claimant had excessive absenteeism.

In addition, I would note the discrepancy in the administrative law judge's decision regarding the final act that led to the Claimant's termination. The administrative law judge found that the Claimant failed to report to work on July 11<sup>th</sup> because he ran out of gas, and that was the reason for the termination. Yet, the record reflects at Tr. 3 that although the Claimant did run out of gas that day, he nonetheless reported to work 15 minutes late. It was upon being questioned about his failure to make juice and being late as well that the Claimant became upset. Although he admitted yelling in the workplace, he denied throwing anything. (Tr. 10) While I do not condone such behavior in the workplace, given the Claimant's underlying concerns for his family (comatose mother, son living in a juvenile home, bouts with personal illness, etc.) (Tr. 11) it is understandable how he might overreact. At worst, I would consider it to be an isolated instance of poor judgment that didn't rise to the legal definition of misconduct. Based on this record, I would conclude that the Employer failed to satisfy their burden of proof. Benefits should be allowed provided the Claimant is otherwise eligible.

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John A. Peno

AMG/fnv