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

SIMON KOANG Claimant, and CAREER OPTIONS INC Employer.	:	HEARING NUMBER: 09B-UI-09702 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

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. A majority of 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, Simon Koang, was employed by Career Options, Inc. from June 30, 2008 through September 3, 2008 as a full-time maintenance department employee. (Tr. 4, 5-6, 14) The claimant received training back on December 13, 2007 on the proper procedures for performing 'hot work' that which involves "… hot, grinding, welding…" and requires a permit each time, which is issued by the claimant's supervisor. (Tr. 5, 7, 10-11, 15) This type of work also requires a 'fire watch,' i.e., "… somebody that stands and watches to make sure that a fire isn't started as a result of the work." (Tr. 5) The 'fire watch' is member of management. (Tr. 5, 8) The claimant performed hot work according to proper procedures. (Tr. 8)

On August 14, 2008, the claimant received a written warning for "… violation of defective and improper work…" that Mr. Koang signed in acknowledgement of receipt. (Tr. 7, 9, 11, 12, 14-15, 19)

On August 29, 2008, the claimant was working with Joe Costello when he noted a broken bolt on the second shift that needed grinding and replacement. (Tr. 5, 15-16) Mr. Koang immediately called Alex, requesting that he bring a hot work permit so the claimant could fix the bolt. (Tr. 15, 20) When Alex came with the hot work permit (Tr. 18) and the claimant commenced to "… putting the bolt… then he (Jose) go cutting it and then [the claimant] hold it and [they] grind it… in order to cut it properly…" (Tr. 15-16, 20-21) Alex left the men working and returned while the men were still working on repairing the bolt. (Tr. 16, 18) When the work was finished, Mr. Koang signed the hot work permit. (Tr. 18, 19)

When the claimant finished his shift and left to pick up his paycheck, another supervisor named Ben directed him to go upstairs to the office where he confronted him asking, "… Did you know that Alex left you? You worked last night by yourself." (Tr. 16, 19) Mr. Koang denied working alone and asked for Alex, but was told that Alex had left the building. (Tr. 16-17, 19) The employer via Kristin Mehring then suspended Mr. Koang for two days for a violation of safety and failure to follow procedures pending further investigation. (Tr. 5, 6, 7, 9, 16, 21) On September 3, 2008, the employer contacted the claimant to inform him that a bolt had been found in the meat product. (Tr. 12-13, 16, 21)

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2007) provides:

> *Discharge for Misconduct*. If the department finds the individual has been discharged for misconduct in connection with the individual's employment:
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> 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).

This record contains conflicting testimony as to whether or not Mr. Koang had a hot work permit. Evidence establishes that not only did the claimant receive prior training for this permit (Tr. 5, 7, 10-11, 15), he acknowledged that he understood as to when and how to obtain such a permit. (Tr. 17-18) Mr. Koang provided firsthand testimony that he followed proper procedure on August 29th when he called Alex to obtain the hot work permit prior to beginning hot work to repair the broken bolt. Because a hot work permit can only be issued by a supervisor, we can reasonably presume that Alex was in management and should have been the designated 'fire watch.' (Tr. 5) Here, the claimant also provided firsthand testimony that Alex left the area at some point unbeknownst to him due to the claimant's concentrated attention to his work. (Tr. 16, 18) Mr. Koang also denied to the employer during their investigation that he worked alone and without a hot work permit. (Tr. 17)

The employer, on the other hand, provided hearsay testimony that the claimant was observed performing hot work without any assistance. While hearsay evidence is generally admissible in administrative proceedings and may constitute substantial evidence to uphold a decision of an administrative agency, Gaskey v. Iowa Dept. of Transportation, 537 N.W.2d 695 (Iowa 1995), it must based "upon the kind of evidence on which reasonably prudent persons are accustomed to rely on for the conduct of their serious affairs and may be based upon such evidence even if it would be inadmissible in a jury trial". Iowa Code Section 17A.14(1); see also, McConnell v. Iowa Dept. of Job Service, 327 N.W.2d 234 (Iowa 1982)

Since the burden is on the employer to establish the claimant's disqualification, it would behoove the employer to present either Alex (the claimant's supervisor) or Jose Costello as witnesses to provide firsthand testimony to refute the claimant's allegations. The employer provided no reason as to why neither of these men was available at the hearing. According to Crosser v. Iowa Department of Public Safety, 240 N.W.2d 682 (Iowa 1976), where, without satisfactory explanation, relevant evidence within control of party whose interests would naturally call for its production is not produced, it may be inferred that evidence would be unfavorable.

While it is arguable that the employer's lack of a claimant-signed hot work permit may be indicative that the claimant never obtained one in the first place, it is not probative of this allegation in light of the employer's failure to provide any firsthand eyewitnesses or any documentation of the same. Based on

this record as a whole, we attribute more weight to the claimant's version of events and would conclude that the employer failed to satisfy their burden of proof.

DECISION:

The administrative law judge's decision dated November 6, 2008 is **REVERSED**. The claimant was discharged for no disqualifying misconduct. Accordingly, he is allowed benefits provided he is otherwise eligible.

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John A. Peno

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Elizabeth L. Seiser

DISSENTING OPINION OF MONIQUE F. KUESTER:

I respectfully dissent from the majority decision of the Employment Appeal Board; I would affirm the decision of the administrative law judge in its entirety.

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Monique F. Kuester

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 (documents) 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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Elizabeth L. Seiser

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Monique F. Kuester

AMG/kjo