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

BRADLEY L GRUVER	:	
	:	HEARING NUMBER: 09B-UI-03929
Claimant,	:	
	:	
and	:	EMPLOYMENT APPEAL BOARD
	:	DECISION
LAND O'LAKES 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: 96.5-2-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 majority of the Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

Bradley L. Gruver (Claimant) was employed by Land O'Lakes, Inc. (Employer) from November 22, 2004, until he was discharged February 4, 2009. (Tran at p. 1-2). He last worked in maintenance. (Tran at p. 2).

The Employer requires employees to follow the familiar lock-out/tag out procedure. (Tran at p. 5-6; Ex. 1, p. 12 ff). In the Claimant's case this procedure is designed to assure that no power is flowing through a machine while the Claimant is working on it, thereby avoiding injury to the Claimant or other workers. (Ex. 1, p. 12).

On February 3, 2009 the Claimant was working on the braking mechanism of something called the Munson Mixer. (Tran at p. 2; p. 7; Ex. 1). It is essentially a modified cement mixer. (Tran at p. 7). The Claimant was replacing a brake that is applied to the mixer while cleaning is taking place. (Tran at p. 7; Ex. 1). The Claimant left the mixer in order to obtain a replacement brake. (Tran at p. 7-8; Ex. 1). When he left the Claimant took his locks off the power sources. (Tran at p. 7; p. 9). He left open the door that operates the brake. (Tran at p. 7). This door has a switch on it so that when the door is open the mixer will not operate. (Tran at p. 7; Ex. 1). Other employees, however, could have closed the door and operated the machine as the lock had been removed. (Tran at p. 7). The Claimant did not notify the employees in the area that he was working on the mixer. (Tran at p. 10).

This was the sole incident leading to his discharge. (Tran at p. 3; Ex. 1).

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2009) 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).

It appears that the Claimant made a serious error of judgment. He appears to have concluded that having the door open to the brake was not a risk since the machine could not operate with the door open. It is true that the Claimant was not physically present and not actually in contact with the mixer while he was off looking for a brake. Thus in a sense he was not actually "performing work" on the machine as discussed in the policy. But with the door open and with the Claimant in the process of working on the brake he did technically fall under the lock out/tag out procedure. The Employer has not proven just exactly how injury could result from having the brake door open but, on the other hand, we recognize that procedure is procedure and employees are not to judge for themselves when the risk is great enough to follow procedure. Yet the Employer has not proven that the Claimant decided that he can just ignore safety. As far as this evidence shows the Claimant did not think any risk was posed, did not see himself as currently working on the machine, and so did not see the policy as applicable. This was a mistake. But based on the particular circumstances of this case, especially the lack of any proof of prior discipline for anything similar, we cannot find that this was more than an isolated instance of poor judgment that will not disqualify the Claimant from benefits. 871 IAC 24.32(1)(a).

The Board understands that lock out/tag out procedures are important to worker safety. As the agency that hears appeals from OSHA citations the Board also appreciates that state regulations are involved. This is often the case. Food safety regulations, medical standards, rules of the road, gambling regulations, and privacy regulations are a few examples of the sort of laws that are frequently implicated in cases where an employee has been negligent in isolated instances. In Lee itself the claimant doubtlessly violated the duty to keep a proper lookout while driving. We do not question the decision to terminate a worker for action that creates a violation of state regulation. This may very well be a compelling reason for a termination. But while the employer may have compelling business reasons to terminate the claimant, conduct that might warrant a discharge from employment will not necessarily sustain a disqualification from job insurance benefits. Budding v. Iowa Department of Job Service, 337 N.W.2d 219 (Iowa App. 1983). Thus, in any case, the issue is not the importance of the policy the Claimant violated. The issue is whether the Employer has proved by a preponderance of the evidence that the Claimant committed disqualifying misconduct. We conclude that it has not and benefits are therefore allowed.

DECISION:

The administrative law judge's decision dated April 6, 2009 is **REVERSED**. The Employment Appeal Board concludes that the claimant was discharged for no disqualifying reason. Accordingly, the Claimant is allowed benefits provided the Claimant is otherwise eligible. Any overpayment which may have been entered against the Claimant as a result of the Administrative Law Judge's decision in this case is vacated and set aside.

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John A. Peno

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Elizabeth L. Seiser

RRA/fnv

DISSENTING OPINION OF MONIQUE 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

RRA/fnv