IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

BRIAN J FENZEL Claimant **ARCHER-DANIELS-MIDLAND CO** Employer	**APPEAL 15A-UI-01997-H2T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 01/18/15** **Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge/Misconduct

STATEMENT OF THE CASE:

The employer filed an appeal from the February 4, 2015 (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on March 16, 2015. Claimant participated. Employer participated through Bryce Albrecthtson, A.J. Steines and Jason Dolash. Employer's Exhibit One was entered and received into the record. Claimant's Exhibit A was entered and received into the record.

ISSUE:

Was the claimant discharged for a current act of misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as a production operator beginning on April 24, 2000 through January 26, 2015 when he was discharged.

On August 26, 2014, the claimant was working on top of a rail car when he fell and badly fractured his wrist. The employer immediately suspected that the claimant had not been wearing his mandated fall protection gear which included a harness. The claimant was interviewed in the emergency room that night and pictures were taken of the scene which had been persevered as it was at the time of the accident. All of the claimant's safety gear that he was allegedly wearing during the fall was taken by the employer and safeguarded before being sent to the manufacture for inspection. The employer's actual physical investigation of the scene was completed on or about August 27, 2014. The employer resolved their own internal safety investigation by October 13, 2014 at the latest. The employer determined that the claimant's explanation of the incident did not make sense and was not possible if he had been wearing the proper safety equipment. The claimant changed his story about where he was on the rail car when the accident happened and how the accident had occurred. In trying to recreate the incident, the employer determined that if the claimant had been wearing his fall protection there is no way his hand/wrist would have been able to touch the top of the rail car.

The claimant had been written up previously on July 16, 2014 when the employer found him working on top of rail cars without wearing his fall protection equipment. The claimant was completely off work for two months after the accident. He returned to light-duty work in October 2014. The claimant continued to work light duty until he was released to full-duty work on January 11, 2015. The employer never told the claimant when he returned to light-duty work or at any other time that their investigation was ongoing nor did they tell him that they still needed information to make a determination about any future discipline for him regarding the accident.

The employer did not contact the manufacture of the safety equipment until months after the accident on December 4, 2014 to ask them to conduct an investigation to see if they could determine whether the fall protection had been worn during an accident. There is no reason why the employer delayed contacting the manufacture other than they wanted the claimant to be completely healed and released to full duty work before they took any disciplinary action against him. In a letter authored on January 15, 2015 the manufacture determined that it did not appear the fall protection the claimant was allegedly wearing had been worn during any fall or incident. The shock indicators had not been triggered nor had any stitching been torn on the harness which should have happened had a fall like the claimant described happened. The claimant was not wearing the harness or fall protection when he fell and broke his wrist on August 25, 2014.

The claimant was released to return to full duty work without restrictions on or about January 15, 2015. He was discharged on January 26, 2015 for failing to wear fall protection on August 26, 2014 when he broke his wrist.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

Iowa Code § 96.5-2-a provides:

> An individual shall be disqualified for benefits:
>
> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
>
> a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

Iowa Admin. Code r. 871-24.32(1)a provides:

> Discharge for misconduct.
>
> (1) Definition.
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> 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 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.
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> This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.,* 275 N.W.2d 445, 448 (Iowa 1979).

871 IAC 24.32(8) provides: Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based upon such past act or acts. The termination of employment must be based upon a current act. A lapse of 11 days from the final act until discharge when claimant was notified on the fourth day that his conduct was grounds for dismissal did not make the final act a "past act." *Greene v. EAB*, 426 N.W.2d 659 (Iowa 1988).

The employer knew of the accident/incident immediately. They conducted their own investigation immediately and completed it by October 13, 2014. They delayed until December in contacting the manufacture to ask them to offer an opinion. The administrative law judge is persuaded that the claimant was not wearing his fall protection on August 26, 2014 when the accident happened and his wrist was broken. The employer never put the claimant on notice when he returned to work that their investigation was ongoing or that he could still face discipline for the incident. The employer did not need additional time to conduct the investigation or to learn new information; they just made a strategic decision not to discipline the claimant until after he had been fully released from the doctor. Under these circumstances the lapse of five months between the time the employer learned of the incident and the discharge convinces the administrative law judge that the claimant was discharged for a past act of misconduct. The employer has not established any good cause reason for the delay. Thus, the claimant was discharged for a past act of misconduct and benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The February 4, 2015 (reference 01) decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible.

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Teresa K. Hillary
Administrative Law Judge

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Decision Dated and Mailed

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