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

JOE R ROSACKER

Claimant

and

BIG RIVER UNITED ENERGY LLC

Employer

HEARING NUMBER: 17BUI-04283

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: 96.5-2A, 96.3-7

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE DENIED

The Employer appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. The Appeal Board finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

Joe Rosacker (Claimant) worked for Big River United Energy (Employer), most recently as a full time process operator, from July 1, 2013, until he was fired on March 22, 2017. Ed Roling is production coordinator for the Employer.

Claimant was responsible for testing the slurry pH and solids and completing the Cook Log Sheet to ensure proper fermentation. If the solids are too light or too heavy, this can affect the fermenter performance and the operation of the Employer's plant.

On September 12, 2016 the Claimant received a final written warning for failing to perform a required yeast count. (Exhibit 3). The Claimant was aware his job was in jeopardy for any further

falsification of test results. (Ex. 3; Ex. 5).

On Saturday, March 18, and Sunday, March 19 the Claimant entered test results for at least one test that he did not actually perform. The print-outs and electronic read outs from the various pieces of equipment that could be used to perform the testing failed to verify that the Claimant actually performed the test. The exhibits of the testing print outs supplied by the Employer at hearing showed consecutive unbroken results with no sign of results having been ripped off.

On Monday March 20 workers told Roling to check into Claimant's work. When the Claimant was asked about this he admitted to Roling that he had "missed the tests."

REASONING AND CONCLUSIONS OF LAW:
Iowa Code Section 96.5(2)(a) (2016) 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.

"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 is the duty of the Board as the ultimate trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The Board, as the finder of fact, may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, as well as the weight to give other evidence, a Board member should consider the evidence using his or her own observations, common sense and experience. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In determining the facts, and deciding what evidence to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other evidence the Board believes; whether a witness has made inconsistent statements; the witness's conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). The Board also gives weight to the opinion of the Administrative Law Judge concerning credibility and weight of evidence, particularly where the hearing is in-person, although the Board is not bound by that opinion. Iowa Code §17A.10(3); *Iowa State Fairgrounds Security v. Iowa Civil Rights Commission*, 322 N.W.2d 293, 294 (Iowa 1982). The findings of fact show how we have resolved the disputed factual issues in this case. We have carefully weighed the credibility of the witnesses and the reliability of the evidence considering the applicable factors listed above, and the Board's collective common sense and experience. We have found credible the evidence from the Employer that the Claimant here falsely reported that he had performed tests when he had not. In particular, we find credible the testimony of Mr. Roling that the Claimant had admitted to this. We note that an admission by a party, like the Claimant, is not hearsay. I. R. Evid. 5.801. We also note that the three Members of this Board each listens to the digital recording of this hearing and each has equal access to factors such as tone of voice, hesitancy in responding, etc. as the Administrative Law Judge. We all concur in our determination of finding Mr. Roling's testimony more credible given the factors we identified above.

The credible evidence from the Employer establishes that the Claimant falsified his testing when he knew this was not permitted. We do not base our decision in any way on the anonymous statements of workers who seemed to have reported having seen the Claimant falsify results. This is because those workers remain anonymous. But the testimony of an admission from the Claimant, and the records showing falsification we do find credible. We have carefully examined the records and conclude that they confirm that the Claimant falsified at least one test on March 18. We conclude that the "36.70" result on March 18 was falsified. Of course, this also means that the average of "36.42" was also falsified. While the Employer testified to six falsified results, and we find this credible given the proven falsification of one result, we do not reach whether the *documentation* submitted proves six false results. Given the prior warning one additional act of intentional falsification is sufficient to disqualify.

In general such dishonesty is very often misconduct. *See Larson v. Employment Appeal Board,* 474 N.W.2d 570 (Iowa 1991)(misconduct based on dishonesty in employment application); *Sallis v. Employment Appeal Bd*. 437 N.W.2d 895, 897 (Iowa 1989)(dishonesty regarding absences is exacerbating factor). Thus even a single instance of covering-up a workplace transgression can itself be misconduct. *White v EAB* 448 N.W.2d 691 (Iowa App. 1989). We reach a similar result in falsification of test results, sometimes referred to as "pencil whipping." The Employer's evidence showed its substantial interests in accurate test results. The Claimant was on clear notice from the Employer's policies and his prior warning that such pencil whipping would not be

tolerated. Given this the falsification of even a single test result (and the associated average) is disqualifying.

We find that the Claimant intentionally falsified records on testing. We find that this was a deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees.

Finally, since the Administrative Law Judge allowed benefits and in so doing affirmed a decision of the claims representative the Claimant falls under the double affirmance rule:

> 871 IAC 23.43(3) Rule of two affirmances.
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> a. Whenever an administrative law judge affirms a decision of the representative or the employment appeal board of the Iowa department of inspections and appeals affirms the decision of an administrative law judge, allowing payment of benefits, such benefits shall be paid regardless of any further appeal.
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> b. However, if the decision is subsequently reversed by higher authority:
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> (1) The protesting employer involved shall have all charges removed for all payments made on such claim.
> (2) All payments to the claimant will cease as of the date of the reversed decision unless the claimant is otherwise eligible.
> (3) No overpayment shall accrue to the claimant because of payment made prior to the reversal of the decision.

Thus the Employer's account may not be charged for any benefits paid so far to the Claimant for the weeks in question, but the Claimant will not be required to repay benefits already received

DECISION:

The administrative law judge's decision dated May 16, 2017 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was discharged for disqualifying intentional misconduct. Accordingly, he is denied benefits until such time the Claimant has worked in and has been paid wages for insured work equal to ten times the Claimant's weekly benefit amount, provided the Claimant is otherwise eligible. See, Iowa Code section 96.5(2)(a).

No remand for determination of overpayment need be made under the double affirmance rule, 871 IAC 23.43(3), but still the Employer's account may not be charged.

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Kim D. Schmett

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Ashley R. Koopmans

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James M. Strohman

RRA/fnv

DATED AND MAILED:_____