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

ERIC ELLSWORTH	:	
	:	HEARING NUMBER: 10B-UI-16925
Claimant,	:	
	:	
and	:	EMPLOYMENT APPEAL BOARD
	:	DECISION
UNICCO SERVICE COMPANY	:	
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: 96.5-2A, 96.3-7

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, Eric Ellsworth, was employed by UNICCO Service Co. from October 15, 2007 through September 22, 2009 as a full-time general laborer technician. (Tr. 2-3, 7-8) The employer has safety policy standards for which employees were trained, in part, on working in confined spaces on both October 17, 2007 and January 5, 2009. (Tr. 5, 7, 8, Employer's Exhibit 2-unnumberedpp. 1, 3, 7) The claimant signed an acknowledgement of receipt of these trainings. (Tr. 6, Employer's Exhibit 2-unnumbered pp. 1, 3, 6, 7) Whenever an employee works in a confined space, three factors must occur *prior* to commencing the job: 1) a permit must first be obtained, 2) another person must be present for safety watch, and 3) the area must be marked as a confining space. (Tr. 8, 12) Generally, the lead person or a supervisor obtained the permit and secured a safety watch for these situations. (Tr. 8, 11,

15) The claimant had never been responsible for obtaining a permit in the couple of years he worked at UNICCO. (Tr. 11-12, 19)

On September 2, 2009, the employer issued a write-up to Mr. Ellsworth for not being clean shaven when he used a respirator that resulted in an incomplete seal on the claimant's face, which allowed black dust to gather on his cheeks. (Tr. 4, 9) This was the first time in over a year that the claimant was required to use a respirator. (Tr. 10)

On September 8, 2009 (Tr. 8), the foreman (Garret Uderback) and an employee from Cargill directed him (Tr, 13-14, 18, 20) to perform a job on the cyclone (grain bin) (Tr. 3) that he understood was "… classified as a non-confined space." (Tr. 8, 11, 14, 17-18, 20) In the process, Mr. Ellsworth noted no permit was involved, the area was unmarked, and there was no safety watch present. (Tr. 8, 12) He had worked in this same type of area before wherein no permit, safety watch or confined-space marking was present or necessary. (Tr. 8, 11) Sometimes, however, even if the area was considered a confined space, someone else would obtain the permit ***after*** the job was completed without repercussion. (Tr. 10, 12)

While "… running the back hose… the hose [became] stuck to the side of the wall…" The claimant stuck his arm in the cyclone to move the vacuum hose. (Tr. 3, 9, 12, 13) A Cargill safety person observed the claimant's action and reported him to the employer. (Tr. 3) The employer immediately suspended Mr. Ellsworth pending investigation. (Tr. 8) On September 22, 2009, the employer terminated the claimant for violating a safety rule, i.e., entering a confined space without a permit and 'breaking the plane'. (Tr. 3, 15)

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.

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).

There is no dispute that the claimant received training on safety procedures, particularly relating to confined spaces. The employer's argument that he, therefore, intentionally broke plane and violated the safety rules on confined spaces, at first blush, is worthy of consideration. However, the claimant provided unrefuted testimony that throughout his employment, only the lead person or Cargill personnel had been responsible for obtaining such permits, if and when necessary. He, himself, had never made that decision when job required a permit, much less was the responsible party for getting one.

Additionally, Mr. Ellsworth's testified he didn't know that the area was considered a confined space based on the lead person's contrary description in the first place. (Tr. 8, 11, 14, 17-18, 20) Considering the absence of the three safety prerequisites (permit, safety crew and confine-space marking) for confined spaces, we find the claimant's understanding that he was not working in a confined space both reasonable and credible. The fact that neither of his superiors had first obtained a permit further corroborated the claimant's belief.

We note that the employer failed to provide either Garret Uderback or the Cargill employee who worked with the claimant on the job as firsthand witnesses at the hearing. Thus, the employer's evidence rests solely on hearsay. 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), whether or not hearsay, "an agency must have based its findings "upon the kind of evidence on which reasonably prudent persons are accustomed to rely on for the conduct of their serious affairs..." Iowa Code Section 17A.14(1); see also, McConnell v. Iowa Dept. of Job Service, 327 N.W.2d 234 (Iowa 1982) We attribute more weight to the claimant's version of events. Mr. Ellsworth's one-time reach into the cyclone was not an intentional disregard of the employer's safety policies. At worst, it may have been an isolated instance of poor judgment that did not rise to the legal definition of misconduct. For all the foregoing, we conclude that the employer failed to satisfy their burden of proving their case.

DECISION:

The administrative law judge's decision dated December 17, 2009 is **REVERSED**. The claimant was discharged for no disqualifying reason. Accordingly, he is allowed benefits provided he is otherwise eligible.

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John A. Peno

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Elizabeth L. Seiser

AMG/fnv

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

AMG/fnv

The claimant submitted a written argument to the Employment Appeal Board. The Employment Appeal Board reviewed the argument. A portion of the argument consisted of additional evidence which was not contained in the administrative file and which was not submitted to the administrative law judge. While the argument and additional evidence (documents) were considered, 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/fnv