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

KIMBERLY K BENSKIN	:	
	:	**HEARING NUMBER:** 16B-UI-06809
Claimant	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
GRINNELL REGIONAL MEDICAL CTR	:	
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 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:

Kimberly Beskin (Claimant) worked for Grinnell Regional Medical Center (Employer) as a full-time Licensed Practical Nurse (LPN) from December 18, 2009 until she was fired on May 18, 2016.

On May 6, the Claimant spoke with one of Dr. Gessner's patients. The patient was crying and in pain. The patient said that she had left over Oxycontin, a pain killer, that had been prescribed to her by another doctor. The patient called asking to take one, but was concerned about her pain agreement with Dr. Gessner. The Claimant gave the patient permission to take the Oxycontin. The Claimant made a note in the patient's electronic chart to this effect. This note also states Claimant notified Dr. Gessner about this incident. (Exhibit 3) Claimant printed a copy of this note and placed it on Dr. Gessner's keyboard, as he was out of the office that day. Dr. Gessner learned about this incident when he returned to the office on or about May 10, 2016.

On May 11 three members of management spoke to the Claimant about the incident. The Claimant claimed falsely that her initial notation was incorrect and falsely indicated that the patient had already taken the pain pill when she called. Claimant made an addendum to her note in the patient's chart to reflect this. The addendum also states Claimant reported to the patient that she would be informing Dr. Gessner about the incident. (Exhibit 4). The Employer has proven by the greater weight of the evidence that the Claimant's story about the patient having already taken the medication, as well as the Claimant's addendum were intentionally false.

During claimant's conversation with the employer on May 11, she admitted that she did not perform the medication reconciliation when talking with the patient. Standard practice would have been to notify Dr. Gessner immediately and to perform the medication reconciliation.

The Employer fired the Claimant on May 18, 2016, for falsification of a patient record, breach of patient obligation, and practicing nursing outside her LPN scope of practice.

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:
>
> 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).

This case turns largely on the credibility of the Claimant's argument that she did not actually tell the patient to take the pain killer. 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 first version of events written contemporaneously to the conversation with the patient, and do not credit the Claimant's denials.

First of all, one of the basics for a nurse is accurate charting. The Claimant charted that she told the patient to take the Oxycontin and did not change this until she was challenged over it. This is the second point, that the change in position of the Claimant took place only after she was confronted and thus is suspicious for that reason. Third, the Claimant did not reconcile the medications. This is consistent with her telling the patient to take the medication. But if she had, as she now claims, not given this directive but had merely reported what the patient did on her own then we'd expect the Claimant to take steps to assure that the patient had not endangered herself. This the Claimant did not do, and this lends support to the idea that she herself had *already* determined that it was OK to take the Oxycotin. Fourth is the question of why the patient called. In the first version the patient was in pain, crying, and called to get permission to take a pain killer because she was in pain but was concerned over her pain agreement with Dr. Gessner. In the amended version the patient seemingly called in having taken Oxycotin, but was still crying in pain, in order to report what she had done. We find the original version more likely. We find that if someone was conscientious enough about the pain agreement to call the office to ask about it then they would be more likely to call first to get permission rather than take the medication <u>and then</u> call to find out if what they had done already was safe. Also it is more likely that a person who had not taken oxy would be crying in pain, as described by the Claimant's notes, than a person who had taken oxy would be crying in pain. In short, we just do not believe the Claimant's amended version of events.

Based on our weighing of the evidence we have found that the Claimant instructed a patient to take medication that was "left over" and without a current prescription, that the Claimant then altered medical records to cover this up, and that she then lied to the Employer about it. This being the case, all that remains is whether this is sufficient to constitute misconduct. Each of these three actions is sufficient by itself to constitute misconduct. The instruction to take the medication is *clearly* beyond the scope of practice of an LPN and a very serious matter. Oxycotin is not aspirin, and an LPN is not a physician, a physician assistant, an ARNP, or a psychologist. See generally, Iowa Medical Society v. Iowa Department of Public Health, 831 N.W.2d 826 (Iowa 2013); 655 IAC 6.2(1)(scope of practice for RN does not encompass ARNP functions); 86 G.A. SF 2188 (psychologists only recently granted prescribing authority). An LPN cannot prescribe medications – and the Claimant knew this. Her action of instructing the patient to take the pain killer was forbidden by sound medical practice. This action was a willful and wanton disregard of the standards of behavior which the employer has the right to expect of employees.

Furthermore, the Claimant not only told the patient to take the medication but also tried to conceal this once confronted. 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). In *White* a nurse made a charting error, a matter of simple negligence that ordinarily is not misconduct. When she was questioned about it, the employee "denied the situation and provided misinformation." *White* at 692. The Iowa Court of Appeals found substantial evidence to support disqualification based on "claimant's lack of candor when questioned about the incident." *White* at 692. The Court did not address the underlying reasons for the questioning but found that the single instance of "lack of candor" was sufficient to disqualify. We reach a similar conclusion here. Even if we were not to disqualify the Claimant based on the instruction to the patient, we would disqualify her for altering medical records and for being untruthful with the Employer. This dishonesty is an independent reason to disqualify the Claimant from benefits.

DECISION:

The administrative law judge's decision dated July 8, 2016 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was discharged for disqualifying misconduct. Accordingly, she 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".

The Board remands this matter to the Iowa Workforce Development Center, Benefits Bureau, for a calculation of the overpayment amount based on this decision.

_____
Kim D. Schmett

_____
Ashley R. Koopmans

_____
James M. Strohman

RRA/fnv
DATED AND MAILED:_____