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

LOREN J THORNBURG	:	
Claimant	:	**HEARING NUMBER:** 16B-UI-10036
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
PELLA CORPORATION	:	
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 Claimant appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. The Appeal Board finds the administrative law judge's decision is correct. The administrative law judge's Findings of Fact and Reasoning and Conclusions of Law are adopted by the Board as its own. The administrative law judge's decision is **AFFIRMED**.

The Claimant submitted additional evidence to the Board which was not contained in the administrative file and which was not submitted to the administrative law judge. While the additional evidence was reviewed for the purposes of determining whether admission of the evidence was warranted despite it not being presented at hearing, the Employment Appeal Board, in its discretion, finds that the admission of the additional evidence is not warranted in reaching today's decision. There is no sufficient cause why the new and additional information submitted by the Claimant was not presented at hearing. We note in particular that this case was remanded once already, for the Claimant's failure to call in his number, and this gave the Claimant even more time to send in the police report for consideration. Thus none of the new and additional information submitted has been relied upon in making our decision, and none of it has received any weight whatsoever, but rather all of it has been wholly disregarded.

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 on the indications of being under the influence and/or intoxication shown by the Claimant on his final day. We find that those indications are sufficient to constitute reasonable suspicion for administering a test for alcohol. Iowa Code §730.5(1)(i).

Even if we were to allow the Claimant to rely on the new and additional information, that is, the police report we would not change our mind. It is true that this report bears on the issue of whether the Employer had reasonable suspicion for subjecting the Claimant to a test for alcohol use or was, as the Claimant asserts, merely using the alcohol test as a pretext to cover up an illegitimate motive to get rid of the Claimant. In this we part ways somewhat with the Administrative Law Judge's statement on page three of her decision concerning the police. The ALJ is correct that an actual finding of intoxication is a separate issue from reasonable suspicion of intoxication. But we do think that any actions and determinations made by the police are *relevant* to the question of whether the Claimant in fact exhibited signs sufficient to constitute reasonable suspicion at the time that the Employer decided to demand the test. Our decision to exclude the report is not based on relevance but based on the failure to send it to the agency *prior* to the hearing, as required.

Yet still we do not change our mind on weight of evidence *even if* we consider the report. That report shows that the Claimant spoke with an officer starting at about 3:05 until about 3:15 in the afternoon. The officer reports "no odor of alcohol." We can see no indication of sobriety testing from the officer, but rather only an "extensive conversation." Weighing this information against the testimony of the Employer, as well as considering the entire hearing record as a whole, we still find that the Employer has proven that it had reasonable suspicion to administer the test. *See* Iowa Code §730.5(1)(i). The report of "no alcohol" odor from the officer is at least 25 minutes after the Employer's observations and also some time after the Claimant had left the control of the Employer. Further, it is hearsay proffered by the Claimant and the Employer provided first-hand witnesses. The Claimant also had first-hand evidence, and so we have taken care to consider all the evidence in deciding the question of reasonable suspicion. On balance we find the Employer's evidence about the reasonable suspicion that lead to the testing remains credible, and we give it more weight than contrary evidence *even if* we were to include the police report in the weighing.

Since the Employer has proven that its demand was based on reasonable suspicion, we would then treat this as an issue of insubordination. The Board in insubordination cases evaluates the reasonableness of the employer's demand in light of the circumstances, along with the worker's reason for non-compliance. *See Endicott v. Iowa Department of Job Service,* 367 N.W.2d 300 (Iowa Ct. App. 1985). The Employer's interest is the usual in such cases, that is, "employers have the right to expect a drug-free work place and should be able to require employees to take steps to insure it." *Anderson v. Warren Distribution Company* 469 N.W.2d 687, 689 (Iowa 1991). Safety is the most obvious concern when dealing with the prospect of a sharpener who is under the influence of an intoxicating substance. For his part the Claimant asserts that he didn't want to be humiliated by taking the test. On balance we find that the Employer has proven that the Claimant was insubordinate to such a level as to constitute misconduct.

We find that the Administrative Law Judge did conduct the hearing in an adequate fashion and sufficiently developed the record. *See e.g. In re S.P.,* 719 N.W.2d 535, 539-540 (Iowa 2006)("The authority of a judge to question witnesses is …, of course, abused when the judge abandons his proper role and assumes that of advocate.") ; *Coulter v. EAB*, Case#0-813, slip op. at 7-8 (Iowa App. Feb. 9, 2011)(" The ALJ had no duty to fish for evidence or to assume an adversarial role because Coulter was not represented by counsel."). Meanwhile the rule on obtaining the attendance of your own witness is clear: "It is the responsibility of the parties to request the attendance of such witnesses they believe have knowledge of the facts in issue in the contested case." 871 IAC 26.13(1). Further, "[u]pon the written request of a party in interest received at least three days prior to the date of a hearing, the presiding officer shall issue a subpoena…" 871 IAC 26.13(2). The Notice of Hearing further provides "[i]f you want a witness to testify at the hearing, you must arrange it." It further describes how to subpoena a witness. The Claimant failed to request a subpoena. Had he requested one and the witness refused then the rules set out the procedure to follow. 871 IAC 26.13(9); Iowa Code §96.11(8). Manifestly, that procedure does not need to be followed where no subpoena was timely requested.

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RRA/fnv
DATED AND MAILED:_____

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