

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

RICHARD H BLANKENSHIP

Claimant,

and

TRINITY STRUCTURAL TOWERS INC

Employer.

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HEARING NUMBER: 12B-UI-13343

**EMPLOYMENT APPEAL BOARD
DECISION**

NOTICE

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, 24.32-7

DECISION

UNEMPLOYMENT BENEFITS ARE DENIED

The Claimant appealed this case to the Employment Appeal Board. Two members of the Employment Appeal Board reviewed the entire record. Those members are not in agreement. Monique F. Kuester would affirm and John A. Peno would reverse the decision of the administrative law judge.

Since there is not agreement, the decision of the administrative law judge is affirmed by operation of law. The Findings of Fact and Reasoning and Conclusions of Law of the administrative law judge are adopted by the Board and that decision is **AFFIRMED** by operation of law. See, 486 IAC 3.3(3).

Monique F. Kuester

DISSENTING OPINION OF JOHN A. PENO:

I respectfully dissent from the decision of the Employment Appeal Board; I would reverse the decision of the administrative law judge. The Claimant had numerous absences for which he provided the Employer with doctors' excuses. The final act involved the Claimant missing work on August 26-27th, and not reporting to work thereafter. The Claimant testified that Deb Emert discharged him on August 26, 2011 after he spoke with her about changing shifts. (Tr. 7)

There is no question that the Claimant had a poor attendance record. However, I would find that all of the Claimant's absences were either due to illness and properly reported, or because there was no work available. According to the precepts of *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982), absences due to illness that are properly reported are excused and not misconduct. See also, *Gaborit v. Employment Appeal Board*, 734 N.W.2d 554 (Iowa App. 2007) wherein the court held an absence can be excused for purposes of unemployment insurance eligibility even if the Employer was fully within its rights to assess points or impose discipline up to or including discharged for the absence under its attendance policy. While the Employer may have compelling business reasons to terminate the Claimant, conduct that might warrant a discharge from employment will not necessarily sustain a disqualification from job insurance benefits. *Budding v. Iowa Department of Job Service*, 337 N.W.2d 219 (Iowa App. 1983).

Lastly, I would note that the Employer failed to provide Ms. Emert (who discharged the Claimant) as a firsthand witness to refute the Claimant's testimony. As such, I would attribute more weight to the Claimant's version of events and conclude that the Employer failed to satisfy their burden of proof. Benefits should be allowed provided the Claimant is otherwise eligible.

John A. Peno

AMG/fnv