BEFORE THE
EMPLOYMENT APPEAL BOARD
6200 Park Avenue, Suite 100
Des Moines, Iowa 50321-1270
eab.iowa.gov

JESUS MOLINA GARCIA		
	:	**APPEAL NUMBER:** 24B-UI-04454
Claimant	:	**ALJ HEARING NUMBER:** 24A-UI-04454
	:	
and	:	**EMPLOYMENT APPEAL BOARD**
	:	**DECISION**
AMAZON.COM SERVICES INC	:	
	:	
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

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. 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: Jesus Molina Garcia (Claimant) worked for Amazon.com (Employer) as a full-time stower (warehouse worker) from June, 2021 until he was fired on April 4, 2024. The stated reason for termination was that the Claimant allegedly had low production. No other cause of the termination appears in the record.

In April of 2022 the Claimant hurt his wrist at work. Claimant testified that up until that time he was one of the best workers for employer. In December of 2023 Claimant hurt his shoulder at work. He was not off from work from this injury but chose to work through it. These injuries affected the Claimant’s performance, although he continued to do his best.

Claimant received two warnings regarding alleged low output prior to his being terminated. Claimant stated he did not agree that he had low output and did not sign the warnings.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5 provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
>
> *2. Discharge for Misconduct*. If the department finds the individual has been discharged for misconduct in connection with the individual's employment:
>
> a. The disqualification shall continue until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.
> ….
> d. For the purposes of this subsection, "misconduct" means a deliberate act or omission by an employee that constitutes a material breach of the duties and obligations arising out of the employee's contract of employment. Misconduct is 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 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. Misconduct by an individual includes but is not limited to all of the following:
>
> (1) Material falsification of the individual's employment application.
>
> (2) Knowing violation of a reasonable and uniformly enforced rule of an employer.
>
> (3) Intentional damage of an employer's property.
>
> (4) Consumption of alcohol, illegal or nonprescribed prescription drugs, or an impairing substance in a manner not directed by the manufacturer, or a combination of such substances, on the employer's premises in violation of the employer's employment policies.
>
> (5) Reporting to work under the influence of alcohol, illegal or nonprescribed prescription drugs, or an impairing substance in an off-label manner, or a combination of such substances, on the employer's premises in violation of the employer's employment policies, unless the individual is compelled to work by the employer outside of scheduled or on-call working hours.
>
> (6) Conduct that substantially and unjustifiably endangers the personal safety of coworkers or the general public.
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> (7) Incarceration for an act for which one could reasonably expect to be incarcerated that results in missing work.
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> (8) Incarceration as a result of a misdemeanor or felony conviction by a court of competent jurisdiction.
>
> (9) Excessive unexcused tardiness or absenteeism.

(10) Falsification of any work-related report, task, or job that could expose the employer or coworkers to legal liability or sanction for violation of health or safety laws.

(11) Failure to maintain any license, registration, or certification that is reasonably required by the employer or by law, or that is a functional requirement to perform the individual's regular job duties, unless the failure is not within the control of the individual.

(12) Conduct that is libelous or slanderous toward an employer or an employee of the employer if such conduct is not protected under state or federal law.

(13) Theft of an employer or coworker's funds or property.

(14) Intentional misrepresentation of time worked or work carried out that results in the individual receiving unearned wages or unearned benefits.

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); Iowa Code §96.6(1). 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).

The Employer representative appeared, but no fact-witness appeared for the Employer and so no testimony or evidence was submitted by the Employer. Even when a party with the burden of proof fails to appear at hearing it is still possible for that party to carry its burden of proof through evidence introduced by the opposing party or through review of the file. *See Hy Vee v. Employment Appeal Board,* 710 N.W.2d 1, 3 (Iowa 2005)(In finding that claimant, who did not appear, had proved good cause for her quit the Court holds that the "fact that the evidence was produced by [the employer] and not by the claimant, does not diminish the probative value of it"). Thus judgment is not automatic when the party with the burden fails to present evidence at hearing. Nevertheless it is markedly difficult to carry a burden based on no testimony at all.

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 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 unrebutted testimony of the Claimant that he was not a low-producing employee, and that any decline in his production from his previous high performance was due to injury, not a lack of trying.

First of all, the Claimant disagrees that he was a low producer, and asserts that he merely experienced a reduction in his previous good performance, but remained at least an average performer. The Claimant appeared as a forthright and credible person, and thus the evidence does not support a finding of low production. The entire basis for disqualification, therefore, was not proven by a preponderance of the credible evidence.

Now we are aware that no one is objective about themselves, and that many people will, of course, overrate their own performance. Thus we consider, in the alternative, that the Claimant really was a low performer and deserved to be warned about low production. The problem for the Employer is that poor performance alone is not sufficient to disqualify.

Mere incapacity or incompetence is not disqualifying**.** 871 IAC 24.32(1)(a); *Eaton v. Iowa Dept. of Job Service*, 376 N.W.2d 915, 917 (Iowa App. 1985); *Newman v. IDJS*, 351 N.W2d 806 (Iowa 1984); *Richers v. Iowa Department of Job Service*, 479 N.W.2d 308 (Iowa 1991). In order to prove that poor performance alone disqualifies a claimant what is required is proof that the poor performance was more than mere incapacity or lack of skill. What is required is "quantifiable or objective evidence that shows [the Claimant] was capable of performing at a level better than that at which he usually worked." *Lee v. Employment Appeal Board*, 616 NW2d 661, 668 (Iowa 2000).

We do not have "quantifiable or objective evidence that shows [the Claimant] was capable of performing at a level better than that at which he usually worked." *Lee v. Employment Appeal Board*, 616 NW2d 661, 668 (Iowa 2000). There is no evidence here of a pattern of improving after discipline and slipping in performance again. *See Sellers v. Employment Appeal Bd.*, 531 N.W.2d 645 (Iowa App.1995)(such pattern suggests intentional slacking off). Instead acknowledging that the Claimant had a slide in performance this is linked in this record not to anything intentional by the Claimant but to injury. Baring a showing of intent, or equally culpable negligence, a slip in performance is not enough to show misconduct. *Kelly v. Iowa Dept. of Job Service*, 386 N.W.2d 552 (Iowa App. 1986)(otherwise "[e]very employer could defeat an unemployment claim by merely testifying that an employee was capable, didn't do the job to the employer's satisfaction, and was therefore guilty of misconduct"). This is especially so where the Claimant had previously performed the job well, had no motivation to intentionally slack off, and offers credible medical explanations of his problems.

<u>*New & Additional Evidence:*</u> 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 was not presented at hearing. Accordingly 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.

Note for Employer: The procedural aspects of this case are a little odd. The Employer's fact witnesses did not attend the hearing. We do not know if the witnesses had a legally sufficient excuse for not attending since Employer has filed no argument with the Board. We recognize, of course, that until today the Employer had prevailed and thus did not chose to explain the absence at hearing. We point this out now so that the Employer is explicitly aware of the ability to apply for rehearing of today's decision within 20 days of issuance of today's decision, *including* in the count weekends and holidays. The Employer may make whatever argument

for reopening that Employer thinks appropriate, and this would include argument explaining why the witnesses failed to attend the hearing. We are not saying the argument would necessarily prevail, only that we would consider it. We do caution that the 20-day deadline for applying for rehearing is not flexible.

Finally, we note for the edification of the parties that "[a] finding of fact or law, judgment, conclusion, or final order made pursuant to this section by an employee or representative of the department, administrative law judge, or the employment appeal board, is binding only upon the parties to proceedings brought under this chapter, and **is not binding upon** any other proceedings or action involving the same facts brought by the same or related parties before the division of labor services, **division of workers' compensation**, other state agency, arbitrator, court, or judge of this state or the United States." Iowa Code §96.6(4) (emphasis added). This provision makes clear that unemployment findings and conclusions are only binding on unemployment issues, and have **no effect** otherwise. See also Iowa Code §96.11(6)(b)(3)("Information obtained from an employing unit or individual in the course of administering this chapter and an initial determination made by a representative of the department under section 96.6, subsection 2, as to benefit rights of an individual shall not be used in any action or proceeding, except in a contested case proceeding or judicial review under chapter 17A…)

DECISION: The administrative law judge's decision dated May 23, 2024 is **REVERSED**. The Employment Appeal Board concludes that the claimant was discharged for no disqualifying reason proven in this record. Accordingly, the Claimant is allowed benefits provided the Claimant is otherwise eligible. Any overpayment which may have been entered against the Claimant as a result of the Administrative Law Judge's decision in this case is vacated and set aside.

James M. Strohman

Myron R. Linn

Ashley R. Koopmans

RRA/mes
DATED AND MAILED <u>JUNE 28, 2024</u>