

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

DANIEL W MCKELVEY

Claimant,

and

HEARTLAND EXPRESS INC OF IOWA

Employer.

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HEARING NUMBER: 11B-UI-11761

**EMPLOYMENT APPEAL BOARD
DECISION**

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. 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, 486 871 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 discharged for being cited by law enforcement for an illegal lane change, which resulted in an accident. According to Ms. Peters, the outcome of the citation is still pending. (Tr. 3-4) There was no record of prior disciplines against the Claimant. Although the outcome is tragic, the record establishes that this was the only incident in the Claimant's three years of driving for the employer. The employer can only establish that the Claimant was cited for a lane change violation. Even if fault was proven, the Claimant's record shows no reoccurring instances of negligence such that could be deemed misconduct within the meaning of the law. 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).

Based on this record, I would conclude that the Claimant's single traffic citation with no other incidents does not rise to the legal definition of misconduct. For this reason, I would allow benefits provided the Claimant is otherwise eligible.

John A. Peno

AMG/fnv