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

THOMAS R BURNSED	:	
	:	HEARING NUMBER: 09B-UI-13202
Claimant,	:	
	:	
and	:	EMPLOYMENT APPEAL BOARD
	:	DECISION
HEARTLAND EXPRESS INC OF IOWA	:	
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 ALLOWED IF OTHERWISE ELIGIBLE

The Employer appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. A majority of the Appeal Board, one member dissenting, finds it cannot affirm the administrative law judge's decision. The majority of the Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

Thomas Burnsed (Claimant) worked for Heartland Express (Employer) as a full-time over-the-road tractor/trailer driver from April 2, 2008 until his discharge on August 10, 2009. (Tran at p. 3; p. 5-6). His immediate supervisor was his dispatcher. (Tran at p. 3).

The Claimant was warned in January of 2009 to make all deliveries on time because he had made a late delivery. (Tran at p. 4-5). The Claimant had been warned to review Qual-com communications. (Tran at p. 5). He was made aware that future late deliveries could result in his termination from employment. (Tran at p. 5; p. 7). The Claimant had also been previously warned for a late delivery on December 29, 2008. (Tran at p. 4-5).

The Claimant was scheduled to deliver a load in Savage, Maryland on August 6, 2009. (Tran at p. 3). The Claimant did not deliver the load until August 7, 2009. (Tran at p. 3). The Claimant told the Employer that he had misread the delivery date on the Qual-com message that had been sent to him. (Tran at p. 4). He stated that he thought the delivery was to be on Friday the 7th, when in fact it was to be Thursday the 6th. (Tran at p. 4). The Qual-com did correctly state the delivery was to be the 6th. (Tran at p. 4). The Claimant did not carefully read the Qual-Com, and he reviewed it only once. (Tran at p. 6; p. 7). The Claimant had 15 years of experience. (Tran at p. 7).

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2009) 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).

Carelessness may be considered misconduct when an employee commits repeated instances of ordinary carelessness. Where the employee has been warned about the careless behavior, but continues with the same careless behavior, the repetition of the careless behavior constitutes misconduct. See Greene v. Employment Appeal Board, 426 N.W.2d 659, 661-662 (Iowa App. 1988).

It was fundamental a driver's job that deliveries be on time. Naturally, from time to time, circumstances outside the driver's control may result in a late delivery. But careful reading is manifestly within the driver's control. The Claimant acknowledges that he did not read carefully enough. He attributes this to driving conditions at the time. We can appreciate this, but we also appreciate that he knew what the conditions were and whether he was distracted while reading the Qual-com. The Claimant just didn't take the care to double-check when he was aware that he had reviewed the communications under less-than-ideal circumstances. This was careless of the Claimant. Moreover the Claimant was well aware that he was on the edge and needed to take *extra* care. Instead, he did the opposite. This carelessness by the Claimant, in conjunction with his prior problems, was a disqualifying act of misconduct.

Finally, since the Administrative Law Judge allowed benefits and in so doing affirmed a decision of the claims representative the Claimant falls under the double affirmance rule:

> 871 IAC 23.43(3) Rule of two affirmances.
>
> a. Whenever an administrative law judge affirms a decision of the representative or the employment appeal board of the Iowa department of inspections and appeals affirms the decision of an administrative law judge, allowing payment of benefits, such benefits shall be paid regardless of any further appeal.
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> b. However, if the decision is subsequently reversed by higher authority:
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> (1) The protesting employer involved shall have all charges removed for all payments made on such claim.
> (2) All payments to the claimant will cease as of the date of the reversed decision unless the claimant is otherwise eligible.
> (3) No overpayment shall accrue to the claimant because of payment made prior to the reversal of the decision.

Thus the Employer's account may not be charged for any benefits paid so far to the Claimant for the weeks in question, but the Claimant will not be required to repay benefits already received.

DECISION:

The administrative law judge's decision dated October 5, 2009 is **REVERSED**. The Employment Appeal Board concludes that the claimant was discharged for disqualifying misconduct 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".

No remand for determination of overpayment need be made under the double affirmance rule, 871 IAC 23.43(3), but still the Employer's account may not be charged.

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Elizabeth L. Seiser

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Monique F. Kuester

RRA/fnv

DISSENTING OPINION OF JOHN A. PENO:

I respectfully dissent from the majority decision of the Employment Appeal Board; I would affirm the decision of the administrative law judge in its entirety.

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John A. Peno

RRA/fnv