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

STEVEN C KESSLER Claimant, and HEARTLAND EXPRESS INC OF IOWA Employer.	:	**HEARING NUMBER:** 07B-UI-10070 **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

The claimant 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 Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

The claimant, Steven C. Kessler, worked for Heartland Express, Inc. of Iowa from July 19, 2006 through October 9, 2007 as a full-time over-the-road tractor trailer driver who was paid by the mile. (Tr. 3, 5) The company has a policy that provides "… any accident can be terms for termination." (Tr. 4)

On October 5, 2007, Mr. Kessler was driving in Chicago as he followed two other trucks when he "… hit the trailer on an overpass and caused damage to the trailer (Tr. 3), i.e., "… took… the top… trailer off and pulled it back…" (Tr. 6) The claimant had seen the sign indicating that the overpass was a 15-foot clearance. (Tr. 5) He believed his truck measured 13 feet, 6 inches in height. Mr. Kessler had no prior warning or counseling about his driving or any similar conduct. (Tr. 4)

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2007) 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.

The Iowa Supreme court has accepted this definition as reflecting the intent of the legislature. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665, (Iowa 2000) (quoting Reigelsberger v. Employment Appeal Board, 500 N.W.2d 64, 66 (Iowa 1993).

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).

The employer discharged the claimant for an isolated act. The record contains no evidence of any other accidents or problematic behavior by the claimant with regard to his job performance, which the

employer corroborates. Mr. Kessler's failure to yield the overpass was, admittedly, an unintentional act, an accident. Although the employer's policy does allow termination for any type of accident, 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).

Here, Mr. Kessler saw the signpost as he followed behind two trucks that apparently cleared the overpass. His good faith belief that his truck's height (13'6") was sufficient for his truck to pass was not intentional, nor intended to cause harm to the employer. Had Mr. Kessler made a previous error such as the October 5th incident, the employer's termination could have come within the legal definition of misconduct, i.e., "... carelessness or negligence of *such degree of recurrence* as to manifest equal culpability..." and would have been disqualifying. However, with this being the only infraction offered into evidence, the Board concludes that this was an isolated instance of poor judgment that did not rise to the legal definition of misconduct. Therefore, the employer has failed to satisfy their burden of proof.

DECISION:

The administrative law judge's decision dated November 19, 2007 is **REVERSED**. The claimant was discharged for no disqualifying reason. Accordingly, he is allowed benefits provided he is otherwise eligible.

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Elizabeth L. Seiser

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John A. Peno

DISSENTING OPINION OF MARY ANN SPICER:

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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A portion of the claimant's appeal to the Employment Appeal Board consisted of additional evidence which was not contained in the administrative file and which was not submitted to the administrative law judge. While the appeal and additional evidence (documents) were reviewed, the Employment Appeal Board, in its discretion, finds that the admission of the additional evidence is not warranted in reaching today's decision.

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Elizabeth L. Seiser

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Mary Ann Spicer

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John A. Peno

AMG/kjo