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

DAVID M SCOTT

Claimant,

and

G-LINE TRUCKING INC

Employer.

HEARING NUMBER: 09B-UI-05130

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 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. 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, David M. Scott, worked for G-Line Trucking, Inc. from January 5, 2006 through February 20, 2009 as a full-time tractor trailer driver. (Tr. 3, 8) The employer has a policy, which requires its drivers to provide written notice of an accident in which the driver is involved; if the driver is involved in a second accident, immediate termination results. (Tr. 4)

On February 5th, Mr. Scott took trailer 63 that he had been driving for the past six weeks (Tr. 5) into the employer's yard (Tr. 4, 9) where he performed a ground inspection noting that the front right light was damaged. (Tr. 6, 9) The claimant signed a form acknowledging this damage and turned it into the employer who, in turn, took the trail to Thermo King dealer in Dubuque (Tr. 4, 9) for service work. The dealer later contacted the employer regarding damage to the trailer's roof, which Mr. Scott had not

reported to the employer (Tr. 4-5, 6) because he could not see this damage from the ground level. (Tr. 8, 9, 13) The claimant did not strike anything with this trailer. (Tr. 8)

The employer mailed the claimant a letter dated February 5th that warned that any future failures to report an accident would result in his termination. (Tr. 5, 6,) The claimant did not receive this letter because he had been on the road and had no chance to retrieve his mail. (Tr. 11) In the meantime, on February 12, 2009, the claimant sideswiped a four-wheel vehicle after running a stop sign that was not visible when he had the accident. (Tr. 5, 10, 11) The local sheriff issued a ticket to him. (Tr. 11) Several days later (February 19, 2009), the employer's insurance carrier sent Mr. Scott a letter indicating that they could no longer insure him as a driver for the employer. (Tr. 6, 10) The following day, the employer handed Mr. Scott the warning letter for the February 5th incident and subsequently terminated him for having two preventable accidents within a 30-day period. (Tr. 3, 8)

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.

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 for the claimant for presumably having two preventable accidents within a 30-day period. However, as to the first alleged infraction, the claimant denied being involved in an accident. He provided a plausible excuse for why he failed to report the roof damage of which he had no knowledge and could not physically see from the ground. The employer produced no witness(s) to corroborate their allegation that he was responsible for this damage, outside of that which he reported about the front right light. The fact that the claimant had the truck for the past six weeks is not probative that he caused the damage to the trailer's roof. In addition, the claimant had no knowledge that his job was in jeopardy as the claimant did not receive the February 5th warning letter sent to him. The first time he received such notice was on the day he was actually terminated.

As for the final incident, it is arguably an isolated incident with mitigating circumstances. True, the claimant was issued a ticket; however, the case is still pending. According to Mr. Scott's unrefuted testimony, he did not know there was a stop sign at the intersection because it was obscured at the point the accident occurred. (Tr. 12)

This record as it stands lacks substantial evidence to show that the claimant's actions were the result of "….carelessness or negligence of such degree of recurrence as to manifest equal culpability….or to show an intentional and substantial disregard of the employer's interests…" 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). For the foregoing reasons, we conclude that the employer failed to satisfy their burden of proof by a preponderance of the evidence that the claimant should be disqualified.

DECISION:

The administrative law judge's decision dated May 1, 2009 is **REVERSED**. The claimant was discharged for no disqualifying reason. Accordingly, he is allowed benefits.

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John A. Peno

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Elizabeth L. Seiser

AMG/fnv

DISSENTING OPINION OF MONIQUE F. KUESTER:

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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Monique F. Kuester

AMG/fnv