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

JOHN LOCKE	:	
	:	HEARING NUMBER: 09B-UI-12522
Claimant,	:	
	:	
and	:	EMPLOYMENT APPEAL BOARD
	:	DECISION
BARR-NUNN TRANSPORTATION 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-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 majority of the Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

John Locke (Claimant) was hired as a full-time over-the-road driver for Barr-Nunn Transportation (Employer) on July 24, 2008, and last worked for the Employer on July 25, 2009. (Tran at p. 3; p. 12; Ex. 1).

On July 15, an employee-driver discovered during a pre-trip inspection that his trailer was missing a bumper guard. (Tran at p. 4). The Employer learned that the Claimant had previously operated the trailer. (Tran at p. 4-5). The Claimant had most recently driven the empty trailer for about 30 miles to make a switch with a loaded trailer. (Tran at p. 13; p. 14).

When questioned by the Employer, the Claimant believed the bumper guard was there during his pre-trip on July 13. (Tran at p. 5; p. 13). The employer discharged the Claimant for safety issues involving a

failure to report an accident or damage based on the bumper issue. (Tran at p. 3-4; Ex. 1). The preponderance of the evidence fails to establish that the Claimant was responsible for the missing bumper, or that it was missing when the Claimant last saw the truck.

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).

The Employer does not convince us by the greater weight of the evidence that the Claimant committed

misconduct. One *could* find that the Claimant damaged the truck during his time driving it. Equally as likely, one *could* conclude that the other driver was responsible for the missing bumper. One *could* even conclude that the Claimant overlooked the missing bumper when he first checked out the truck, because it

was dark out and he was focused on other issues in the inspection. It would be troubling that the Claimant missed the issue the next day, but as it was the same trailer, and had not been anywhere, a cursory inspection would not be misconduct. This would be an error due to oversight and not misconduct. In any event, even disregarding the issue of overlooking the bumper during the inspection, it is no more likely that the Claimant had an unreported accident than the other driver had an unreported accident. We also note that had the bumper been missing at the time of the exchange, it would be reasonable for the transfer driver to have noticed *at that time*. This did not happen.

The disqualifying possibility and the non-disqualifying possibilities are equally likely given the Employer's evidence. The evidence being, at best, equally balanced the party with the burden of proof – the Employer – fails to carry the burden.

If we had found that the Claimant did intentionally fail to report an accident we would have no trouble, especially given his discipline history, in disqualifying him. What we have found, however, is that the Employer failed to prove that that the final incident, which was the precipitating cause of the discharge, was misconduct. The discharge was thus not caused by misconduct and is therefore not disqualifying. See generally, West v. Employment Appeal Board, 489 N.W.2d 731, 734 (Iowa 1992)("must be a direct causal relation between the misconduct and the discharge" and "an employer must establish that the employer discharged the claimant because of a specific act or acts of misconduct"). We thus find that the Claimant is not disqualified because the final act for which he was terminated has not been shown to be misconduct.

DECISION:

The administrative law judge's decision dated September 18, 2009 is **REVERSED**. The Employment Appeal Board concludes that the claimant was discharged for no disqualifying reason.

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John A. Peno

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Elizabeth L. Seiser

AMG/kk

DISSENTING OPINION OF MONIQUE 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/kk