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

JOHNN A ESPITIA	:	
	:	HEARING NUMBER: 10B-UI-14272
Claimant,	:	
	:	
and	:	EMPLOYMENT APPEAL BOARD
	:	DECISION
SCHENKER LOGISTICS 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

STATEMENT OF THE CASE:

The claimant filed an appeal for which a record was made of the hearing and distributed to both parties. The record, however, was missing one page from the Employer's Exhibit One that the Board subsequently located. By Order, the Board sent each party a copy of the missing page and allowed the parties time to respond. Having allowed the parties an opportunity to respond and having taken the opportunity to consider all the evidence, the Board is now ready to issue its decision.

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, Johnn A. Espitia, was employed by Schenker Logistics, Inc. from August 11, 2008

through August 19, 2009 as a full-time case pick operator. (Tr. 9-10, 26) The claimant is a Spanish-speaking person with limited understanding of and inability to read English (Tr. 37) His job duties consisted of

operating a pallet jack that picked up cases from one location and placed the cases onto another pallet jack to be loaded for delivery. (Tr. 9) The employer has a no-fault attendance policy (Tr. 10) for which the employer has a progressive disciplinary policy which allows three warnings prior to an employee's being terminated for excessive unexcused absenteeism. Mr. Espitia received a copy of this policy as well as a copy of the policy is posted on the Human Resources board. (Tr. 14)

On April 1, 2009, the company switched attendance tracking systems by having the employees use an 800 call-in number to report their absences prior to the start of their shifts. (Tr. 10, 2, 36)

Mr. Espitia was off work due to illness from July 27th through 31st, 2009 for which he provided the employer with a doctor's excuse. (Tr. 21) The employer asked the claimant if he could work overtime on August 7th, 2009; the claimant indicated that he wasn't sure because the employer requested late. (Tr. 18-19, 27) When the claimant did not show up the overtime shift on August 7th, he was assessed a point. (Tr. 19) The next day, the employer issued a written warning to the claimant for having accumulated seven attendance points. (Tr. 14, 16, 20, 22, 23)

On August 9th, Mr. Espitia was sick and couldn't report to work. (Tr. 10, 13, 28, 30) He tried to contact the employer using a number off a business card he received during his first week of training. (Tr. 32, 35, Claimant's Exhibit A-unnumbered pp. 2-3), but was unable to get anyone. He did not have the 800 number with him. (Tr. 28, 31) The claimant returned to work the next day (Tr. 12) and explained to his supervisor that he had been ill. (Tr. 31) By this time, the claimant had accumulated 12 points (Tr. 12-13) for which the employer issued a final warning on August 13th. (Tr. 14, 33) Mr. Espitia was worried about missing another day and being fired. (Tr. 34) He went to his supervisor for advice. On August 18th, the employer terminated the claimant for having reached ten points. (Tr. 26-27)

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 claimant was terminated for having going over the allotted points in a no-fault attendance policy. Both parties agree that several of Mr. Espitia's absences were due to illness, which by law are excused according to the precepts of Cosper, *supra*. The last two absences, August 7th and August 8th, contributed to his point accumulation which resulted in his termination.

The parties provided conflicting evidence as to whether the claimant was supposed to work the overtime shift on August 7th. The claimant denied ever accepting the offer to work that shift, and the employer failed to provide any firsthand witness to refute his testimony about this date. For lack of evidence, we attribute more weight to the claimant's firsthand testimony, particularly since this was not his regularly scheduled shift in the first place.

As for his final absence, the claimant was off work due to illness, which the employer does not dispute. Instead, the employer focuses on the admitted fact that the claimant did not call the 800 number to report that absence. Mr. Espitia provided credible testimony that he did not have the 800 number available to him at the time he needed it. So, he reasonably relied on the number found a business card the employer gave him early on in his employment and of which he used in the past to report absences. While this final absence may be arguably unexcused, the fact that Mr. Espitia made a good faith attempt to comply with the notification requirement and provided corroborating documentation of the number he used, we find the measures he took to be mitigating factors that would render this final absence excused. We would also note that exceeding allotted number of points in a no-fault attendance policy is not dispositive of misconduct. Based on the foregoing, we conclude that the employer failed to satisfy their burden of proof.

DECISION:

The administrative law judge's decision dated October 22, 2009 is **REVERSED**. The claimant was discharged for no disqualifying reason. Accordingly, he is allowed benefits provided he is otherwise eligible.

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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