BEFORE THE EMPLOYMENT APPEAL BOARD

Lucas State Office Building Fourth floor Des Moines, Iowa 50319

•	
٠	

NABATE JOHNSON

HEARING NUMBER: 12B-UI-13454

Claimant,

.

and

EMPLOYMENT APPEAL BOARD

DECISION

NETWORK IMAGINING SOLUTIONS:

INC

Employer.

NOTICE

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, 24.32-7

DECISION

UNEMPLOYMENT BENEFITS ARE DENIED

The claimant appealed this case to the Employment Appeal Board. Two members of the Employment Appeal Board reviewed the entire record. Those members are not in agreement. Monique F. Kuester would affirm and John A. Peno would reverse the decision of the administrative law judge.

Since there is not agreement, the decision of the administrative law judge is affirmed by operation of law. The Findings of Fact and Reasoning and Conclusions of Law of the administrative law judge are adopted by the Board and that decision is **AFFIRMED** by operation of law. See, 486 IAC 3.3(3).

John A. Peno		
Monique F. Kuester	r	

AMG/kk

DISSENTING OPINION OF JOHN A. PENO:

I respectfully dissent from the decision of the Employment Appeal Board; I would reverse the decision of the administrative law judge. The record establishes that the claimant was in a disagreement about his number of tardies. He worked a flexible schedule and disagreed with the employer's warnings. Although the claimant's explanation for the final act of punching in 18 minutes late is somewhat sketchy, the employer failed to participate in the hearing to present any firsthand testimony to refute the claimant's testimony. The burden is on the employer to establish that the claimant committed job-related misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Even if the final act was considered unexcused, the employer bears the burden to establish that the claimant had excessive absenteeism. For this reason, I would conclude that misconduct was not established and that benefits should be denied provided the claimant is otherwise eligible.

	John A. Peno	
A M (C /1-1-		

AMG/kk