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

SEAN P RYAN	:	
	:	**HEARING NUMBER:** 16B-UI-08790
Claimant	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
RECYCLING SERVICES LLC	:	
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 DENIED

The Employer appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. The Appeal Board finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

Sean Ryan (Claimant) worked for Recycling Services (Employer) as a full time buyer/outside sales agent form January 26, 2009 until he was fired on June 23, 2015. He was discharged for speeding while driving the company vehicle during work time.

The final incident occurred on June 22, 2015, when the Employer pulled a report from a GPS tracker that was connected to the Claimant's work vehicle. The report revealed the Claimant's work vehicle exceeded 90 miles per hour on three occasions:

May 15, 2015: 91.3 MPH
April 28, 2015: 91.5 MPH
April 20, 2015: 96.3 MPH

The Claimant was the only driver at these times. During the course of the Claimant's employment, he received four speeding tickets, between work and personal use, including one most recently in March 2015. After getting these tickets the Employer spoke with the Claimant, emphasizing the need to slow down and the need not to create risks to the public or to himself by driving too fast.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2016) 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).

It is the duty of the Board as the ultimate trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The Board, as the finder of fact, may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, as well as the weight to give other evidence, a Board member should consider the evidence using his or her own observations, common sense and experience. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In determining the facts, and deciding what evidence to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other evidence the Board believes; whether a witness has made inconsistent statements; the witness's conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). The Board also gives weight to the opinion of the Administrative Law Judge concerning credibility and weight of evidence, particularly where the hearing is in-person, although the Board is not bound by that opinion. Iowa Code §17A.10(3); *Iowa State Fairgrounds Security v. Iowa Civil Rights Commission*, 322 N.W.2d 293, 294 (Iowa 1982). The findings of fact show how we have resolved the disputed factual issues in this case. We have carefully weighed the credibility of the witnesses and the reliability of the evidence considering the applicable factors listed above, and the Board's collective common sense and experience. We have found credible the Employer's evidence that the GPS shows the Claimant's maximum speed to be as we stated in the findings of fact. This level of speeding is a clear act of misconduct where the Claimant was previously warned to slow down, and where he drove as part of his job duties.

While we have credited the Employer's *testimony* showing the Claimant's speed, we in the alternative find that even if the Claimant was only driving 85-90 miles per hour, still we would find misconduct.

The Claimant repeatedly and intentionally drove the Employer's vehicle illegally. Now people do illegal things all the time when driving. With all due respect to our sister agency, the Iowa DOT, we would not find misconduct based on trivial traffic violations. But the level of excess speed shown here is serious, substantial, and deliberate. Given that the Claimant was driving the Employer's car, and given the **obvious** risks, including liability and licensing, associated with such excessive speeding we have no trouble finding that the Claimant committed disqualifying misconduct. *See Cook v. IDJS*, 299 N.W.2d 698, 702 (Iowa 1980)("While he received most of his driving citations during non-work hours and in his personal car, they all bore directly on his ability to work for Hawkeye.").

The Board has reviewed the argument of the parties, and all other submissions. In reviewing the argument the Board disregards any factual assertions which are not based on testimony at hearing, or on exhibits at hearing, or on facts of which judicial notice may be taken or on other facts within the specialized knowledge of the agency. Where official notice of a fact is taken, our decision will specifically say so.

The Employer has submitted new and additional information which was not contained in the administrative file and which was not submitted to the administrative law judge. While the additional information was reviewed we deny its admission. In reviewing the additional information, we review it for whether the proffered information is admissible under 17A.14(1), and whether sufficient cause excuses the failure to present the information at hearing. If we find that the information is not admissible under the standards of 17A.14(1) then the information is not relied upon in making our decision, and it receives no weight whatsoever, but rather is wholly disregarded. If we find that failure to present the new and additional

information at hearing is not excused by sufficient cause then the new and additional information is not relied upon in making our decision, and receives no weight whatsoever, but rather is wholly disregarded. There is no sufficient cause why the new and additional information submitted by the Employer, including both the ICIS printout and the apparent GPS readouts, were not presented by the Employer at hearing. Accordingly the Board finds that the admission of the additional information is not warranted in reaching today's decision. All the new and additional information submitted by the Employer, including both the ICIS printout and the apparent GPS readouts, has not been relied upon in making our decision, and has received no weight whatsoever, but rather has been wholly disregarded.

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Kim D. Schmett

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Ashley R. Koopmans

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James M. Strohman

RRA/fnv