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

VINCE A JUNE	:	
	:	**HEARING NUMBER:** 20BUI-01343
Claimant	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
P J IOWA LC	:	
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: 96.5-1

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. 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:

The Administrative Law Judge's findings of fact are adopted by the Board as its own. In addition, the Board finds that the Claimant has shown by a greater weight of the evidence that he was not responsible for the hit and run incident which caused his vehicle to be impounded.

REASONING AND CONCLUSIONS OF LAW:

This is Not A Quit: Iowa Code section 96.5(1) provides:

> An individual shall be disqualified for benefits: Voluntary Quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

Generally a quit is defined to be "a termination of employment initiated by the employee for any reason except mandatory retirement or transfer to another establishment of the same firm, or for service in the armed forces." 871 IAC 24.1(113)(b). Furthermore, Iowa Administrative Code 871—24.25 provides:

> Voluntary quit without good cause. In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5.

Since the Employer had the burden of proving disqualification the Employer had the burden of proving that a quit rather than a discharge has taken place. The Iowa Supreme Court has thus been explicit: "the employer has the burden of proving that a claimant's departure from employment was voluntary." *Irving v. EAB,* 883 N.W.2d 179 (Iowa 2016). On the issue of whether a quit is for good cause attributable to the employer the Claimant had the burden of proof by statute. Iowa Code §96.6(2). "[Q]uitting requires an intention to terminate employment accompanied by an overt act carrying out the intent." *FDL Foods, Inc. v. Employment Appeal Board,* 460 N.W.2d 885, 887 (Iowa App. 1990), *accord Peck v. Employment Appeal Board,* 492 N.W.2d 438 (Iowa App. 1992).

At first blush this case just doesn't look like a quit. The Claimant did not intend to quit, and *he* took no action that led to the separation. The police took action prompted by an *alleged* offense of the Claimant. But the record establishes that this was a mistake by the police. There is thus no intent to quit, and no over act of quitting.

The Administrative Law Judge cites rule Code rule 871-24.25(1) which says that "The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer: … The claimant's lack of transportation to the work site unless the employer had agreed to furnish transportation." Under this rule the Administrative Law Judge seemingly concludes the separation must be deemed, by law, to be a quit even though not factually a quit. This approach was soundly rejected by the Iowa Supreme Court in *Irving v. EAB,* 883 N.W.2d 179 (Iowa 2016). There Ms. Irving had been arrested, and incarcerated. Because she could not make bail she missed a lot of work. Since she was nurse, and could not work remotely, she was eventually separated from work. The Board had relied on a rule in the very same list of subrules relied upon by the Administrative Law Judge. That subrule, now repealed, stated "the following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer: ... The claimant is deemed to have left if such claimant becomes incarcerated." Iowa Admin. Code r. 871-24.25(16)." *Irving* at 204. The Court, though a little confused on whose rule was being interpreted, rejected the argument that this rule means the worker must be deemed to have quit:

> The rule states that the listed "reasons for a voluntary quit *shall be presumed to be without cause attributable to the employer*." Iowa Admin. Code r. 871-24.25 (emphasis added). Thus, the focus of the rule is determining which departures from employment cannot be excused for purposes of disqualification for unemployment benefits because the quit was a result of cause attributable to the employer. Under subsection (16), a claimant is "deemed to have left if such claimant becomes incarcerated." Id. r. 871-24.25(16). Thus, when a claimant leaves employment due to incarceration, it cannot be maintained that the quit was due to "cause attributable to the employer."

The rule does not address the predicate issue of voluntariness. It only addresses the distinctly different issue of when an otherwise voluntary departure may nonetheless not lead to disqualification because of good cause attributable to the employer. As our caselaw repeatedly points out, these are separate issues….

> So construed, the rule is consistent with Iowa Code section 96.6(2). The statute allows a shifting of the burden of proof where a voluntary quit is claimed to not be disqualifying because of "good cause attributable to the employer." Iowa Code § 96.6(2). Irving, of course, makes no such claim. She only contends that her absence from employment due to her incarceration was not voluntary.
> ….
> The term "voluntary" requires volition and generally means a desire to quit the job. … Under the record here, the employer did not meet that burden. The record simply shows that Irving was arrested, that her incarceration continued for a period of time, that she was unable to make bail, and that the charges resulting in her incarceration were ultimately dropped. There is no substantial evidence to show that her absence from work was voluntary.

Irving at 210. This discussion disposes of this case as well. Like Ms. Irving the Claimant was unable to fulfill his obligations to the Employer. He needs a car to make deliveries just as Ms. Irving needed to be present at the hospital to render nursing cares. Both were unable to fulfill their obligations because of the mistaken action of the State. In both instances the record fails to disclose by a preponderance *any* volitional action *by the claimant for benefits* that caused the state to act as it did. Just as in *Irving* "[t]here is no substantial evidence to show that [the Claimant's] absence from work was voluntary." *Id.* And just like *Irving* this is not changed by rule 24.25. Subrule 24.25(16) of that rule, which shared the introductory operative language with subrule 24.25(1), was interpreted in *Irving* as governing only the issue of good cause, not the existence of a voluntary leaving of employment. This interpretation was based on the language "The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer," and that language also applies to rule 24.25(1). This being the case we cannot conclude that rule 24.25(1) says anything whether a quit has taken place. The Claimant thus has not been shown to have quit, and we cannot deem a quit to exist under rule 24.25(1). We thus turn to whether misconduct was proven.

Misconduct is Not Proven: Iowa Code Section 96.5(2)(a) 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 Iowa Supreme Court has several times addressed the situation where someone loses a job because the employer is required to fire the person. In *Holt v. IDJS*, 318 N.W.2d 28 (Iowa 1982), Mr. Holt worked as a special education teacher but had not obtained a permanent certification. He obtained a temporary certification that allowed him to continue in his position until his coursework was completed. *Holt* at 28. Mr. Holt did not finish his coursework in a timely fashion because his wife had sustained a serious injury. Mr. Holt was then fired for failing to meet the job requirements – he was no longer certified and couldn't teach. *Id.* The Supreme Court reversed the denial of benefits to Mr. Holt. The Court found that the failure to obtain the certification resulted from the serious injury to Holt's wife and the need to care for his four children. *Holt* at 30. Thus misconduct did not lead to the failure to complete the coursework and Mr. Holt was eligible for benefits. *Id.* A more recent case is *Marzetti Frozen Pasta v.* EAB, 08-0288 (Iowa App. 10/29/2008). In that case the claimant was a legal alien present in the United States on temporary protected status. The worker applied for renewal of his status, somewhat late due to the expense. For reasons beyond his control the INS was unable to timely process the application. When his work authorization ran out the claimant was fired by Marzetti because it had no choice – he wasn't authorized to work. The Court of Appeals affirmed the allowance of benefits because the lack of authorization was not due to misconduct. Even though Marzetti was required by federal law to terminate this did not result in a denial of benefits. More recently still, is *Irving v. EAB,* 883 N.W.2d 179 (Iowa 2016) which we discuss above. There the Court found that an innocent person who is held in jail, and thereby misses work, is not guilty of misconduct merely because she cannot make bail. Again, *Irving* is very close to this case in that the Claimant was unable to perform his job due to the action of the State, and the record fails to show the Claimant did the act he was accused of. There is no *proven* volitional conduct at all which led to the loss of the car, much less willful conduct. This case falls under the ruling of *Irving.* It is true that post-*Irving* the statute was amended. But that amendment is specific to incarceration, which refers to the imprisonment of people, not cars. The general principles of *Irving* thus still convince us that misconduct was not proven in this case.

Lack of transportation may however, in many circumstances, mean that a Claimant is not able and available for work. 871 IAC 24.23(4). We therefore remand on the issue of whether the Claimant was able and available during which he either did not have his regular means of transportation or was legally disabled from operating a motor vehicle.

DECISION:

The administrative law judge's decision dated March 11, 2020 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was not separated from employment in a manner that would disqualify the Claimant from benefits. Accordingly, the Claimant is allowed benefits provided the Claimant is otherwise eligible.

This matter is remanded to Iowa Workforce, Benefits Bureau on the issue of the Claimant's availability as set out above.

The Claimant submitted additional evidence to the Board which was not contained in the administrative file and which was not submitted to the administrative law judge. While the additional evidence was reviewed for the purposes of determining whether admission of the evidence was warranted despite it not being presented at hearing, the Employment Appeal Board, in its discretion, finds that the admission of the additional evidence is not warranted in reaching today's decision. There is no sufficient cause why the new and additional information submitted by the Claimant was not presented at hearing. Accordingly, none of the new and additional information submitted has been relied upon in making our decision, and none of it has received any weight whatsoever, but rather all of it has been wholly disregarded.

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Ashley R. Koopmans

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James M. Strohman

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Kim D. Schmett

RRA/fnv