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

RUTH E MARTIN	:	
	:	**HEARING NUMBER:** 11B-UI-01610
Claimant,	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
CARE INITIATIVES	:	
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:

The claimant, Ruth E. Martin, worked for Care Initiatives as a licensed practical charge nurse (LPN) through January 7, 2011. At the start of her hire, the employer issued the claimant a personnel handbook, which the employer reviewed its policies and disciplinary procedures during orientation. The employer has a progressive disciplinary policy of which the first step is a teaching or coaching. The following steps involve category violations; Category B violations are fairly serious in that these violations involve an employee’s failure to perform job requirements and violations of safety and the standard of care to be given to residents. At any time, a step may be skipped if a Category B violation occurs, which may result in termination.

Ms. Martin received a coaching on October 22, 2010 for failing to follow correct procedure for a colonoscopy treatment. The claimant indicated that she didn't have time to follow procedure correctly. On November 23, 2010, the claimant received a Category B warning for administering a routine medication to a resident only after the family reported the resident hadn't received it. Ms. Martin failed to check the MAR (medicine administration book), initially, and appeared not to know that the resident hadn't received it. She received a final warning on December 6, 2010, when she failed to follow a doctor's order to administer one narcotic pain medication for break-through pain; the claimant gave the resident two tablets, which placed the resident in jeopardy because she already wore a morphine patch.

On January 3rd, 2011, at approximately, 2:15 p.m., the claimant noted that Resident B (a frail and elderly gentleman) exhibited an acute change in his physical condition, i.e., quiet and pale. Ms. Martin took his temperature at 5:00 p.m., which read 90.1 degrees, along with other vital signs. (A temperature of 90.1 is indicative of a severe problem, as a body temperature left at 95 degrees could lead to hypothermia.) Proper protocol required Ms. Martin to follow up by: 1) taking his vital sign, again, within 10 minutes; 2) continue to assessing the resident to monitor if he was getting progressively worse; 3) determine whether should there be intervention; or 4) contact the doctor.

Ms. Martin did not follow protocol; instead, she informed January Cole (her attendant CNA) only of Resident B's temperature. She then directed Ms. Cole to lay Resident B down, cover him with blankets, and to keep an eye on him. Ms. Martin, herself, did not come back to check on the resident until 7:15 p.m. at which time she noted that Resident B was pale, not breathing, had no blood pressure or pulse. She then notified the resident's daughter and the doctor that the resident expired.

The employer investigated the matter and discovered that Ms. Martin had not taken any action between the 5:00 p.m. assessment and her assessment at 7:15 p.m., as indicated on the chart. When questioned why, the claimant responded that "he looked like he was resting peacefully." The claimant finished her shift for the day. When she returned to work as scheduled on January 7, 2011, she was terminated for having a 2nd Category B violation.

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:
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> 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).

As an LPN, by her professional training as well as the employer's orientation, the claimant should have known the standard procedure for managing a resident whose body temperature registered well below the normal temperature. On January 3rd, Ms. Martin failed to provide the necessary care for Resident B whose vital signs obviously signaled something was seriously wrong with him. Not only did she fail to respond to the resident's physical changes discovered at 5:00 p.m, she also failed to continue to assess him in response to his drastic change, which resulted in his death.

The claimant's receipt of several prior warnings involving patient care, particularly a prior Category B warning, demonstrates the claimant's "…carelessness or negligence of such degree of recurrence as to manifest equal culpability…[showing] an intentional and substantial disregard of the employer's interests…duties and obligations to the employer." See, 871 IAC 24.32(1), supra. The employer testified that Ms. Martin was fully capable of performing her duties; however, as the record establishes, she failed to administer due care on several occasions. The claimant failed to participate in the hearing to refute any of the employer's evidence, which we find credible. Based on this record, we conclude that the employer satisfied their burden of proof.

DECISION:

The administrative law judge's decision dated March 11, 2011 is **REVERSED**. The Employment Appeal Board concludes that the claimant was discharged for disqualifying misconduct. Accordingly, she is denied benefits until such time she has worked in and has been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. See, Iowa Code section 96.5(2)"a".

Finally, since the Administrative Law Judge allowed benefits and in so doing affirmed a decision of the claims representative the Claimant falls under the double affirmance rule:

> 871 Rule of two affirmances. IAC 23.43(3)
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> a. Whenever an administrative law judge affirms a decision of the representative or the employment appeal board of the Iowa department of inspections and appeals affirms the decision of an administrative law judge, allowing payment of benefits, such benefits shall be paid regardless of any further appeal.
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> b. However, if the decision is subsequently reversed by higher authority:
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> (1) The protesting employer involved shall have all charges removed for all payments made on such claim.
> (2) All payments to the claimant will cease as of the date of the reversed decision unless the claimant is otherwise eligible.
> (3) No overpayment shall accrue to the claimant because of payment made prior to the reversal of the decision.

Thus the Employer's account may not be charged for any benefits paid so far to the Claimant for the weeks in question, but the Claimant will not be required to repay benefits already received.

No remand for determination of overpayment need be made under the double affirmance rule, 871 IAC 23.43(3), but still the Employer's account may not be charged.

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John A. Peno

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Elizabeth L. Seiser

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Monique F. Kuester

AMG/fnv