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

KUBAJA HAILEMICHAEL	:	
	:	**HEARING NUMBER:** 17BUI-02289
Claimant	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
TYSON FRESH MEATS 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: 96.5-1

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 Claimant, Kubaja Hailemichael, worked for Tyson Fresh Meats, Inc. from October 3, 2011 through *January 30, 2017* (February 5, 2017) as a full-time production worker, working primarily from 7:20 a.m. until 4:00 p.m. (27:49-28:43; 29:15-30:05; 40:15-41:36; 42:35-42:55; 43:08-43:45) At some point, the Claimant suffered an injury for which he filed a workers compensation claim. (38:30-38:30) The Employer was aware of the Claimant's medical issue surrounding this claim. (38:07-38:26)

On January 30th, 2017, the Claimant experienced severe back pain because of his workplace injury that he brought to his supervisor's attention. (41:36-41:48) The Employer did not send him to the emergency department; instead, the Employer gave him a cream and some Tylenol, which had no effect. (41:50-42:03) Mr. Hailemichael explained to the company nurse and the general manager that he needed to take care of his health. (51:03-51:33) He sought medical attention

the next day (January 31, 2017) and called off work twice, explaining that he was still ill from his injury the day before. (45:45-45:48; 46:38-46:45; 48:24-48:49; 51:37-51:45; 52:31-52:44)

His doctor released him from work beginning January 31st through February 7th, 2017. (52:55-53:17) Mr. Hailemichael was under his doctor's care and didn't think he needed to continue calling in each day based on his orientation training (55:28-55:52; 57:00-57:50) and his past experience (59:19-59:49; 1:02:10-1:02:23) since the Employer knew of his medical condition on the 31st. (49:30-49:54; 54:45). When he returned on February 7th with the doctor's note excusing him from January 31st through February 7th, 2017, the Employer only acknowledged that he called 'two times.' (46:51-46:57; 47:15-47:20; 48:05-48:12; 50:10)

The Employer via Alberto, a manager, sent Mr. Hailemichael a letter informing him of his termination for being a no call/no show, i.e., job abandonment. (31:26-31:30; 44:50-45:44) The only other instance of no call/no show occurred back in August of 2016, but he spoke with the Employer who then placed him on a leave of absence. (34:00-34:13; 59:19-59:49) Other than that, the Claimant never received any prior disciplinary warnings issued against him. (33:40-33:50)

(ER voluntarily discontinued participation at 39:34)

REASONING AND CONCLUSIONS OF LAW:

871 IAC 24.1(113) "b" and "c" provides:

> *Separations*. All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations.
>
> > *Quits.* A quit is 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.
> >
> > *Discharge.* A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, failure to pass probationary period.

871 IAC 24.32(4) provides:

> *Report required*. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In the cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

"[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).

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. We attribute more weight to the Claimant's version of events. Here, the record contains no evidence that the Claimant ever intended to sever his relationship with the Employer. In fact, Mr. Hailemichael reported back to work on the date he was medically released to do so. A person desiring to quit his employment would have no reason to call in his absence in the first place to apprise the Employer of his medical condition, or bother to return at all. Because the demonstrated no intention to quit, much less an over act to carry out such an intention, we cannot characterize his separation as a voluntary quit.

Mr. Hailemichael provided unrefuted testimony that his final absences were precipitated by a work-related injury for which the Claimant filed a workers compensation claim. The Employer did not deny he was still suffering the effects of his injury and admitted he called in on the 31st. The Employer, however, minimized his calling off work as merely a notification that he was sick for that day. Although the Claimant did not call in each and every day he was absent, he appropriately provided a doctor's note excusing him for each of those days. The timing of Mr. Hailemichael's submission of the doctor's note was not unreasonable given his past experience with an absence in August of 2016, or given the training he received in his orientation. There was no evidence adduced to establish he ever received a personnel handbook that would either corroborate or refute his testimony that he had no knowledge of his reporting responsibility. For this reason, we cannot conclude that he failed to comply with the attendance policy as the Employer may have us believe.

Based on this record, we conclude the Claimant was discharged for disqualifying reasons. He properly reported his absences according to the precepts of *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982) In *Cosper,* the court held that absences due to illness, which are properly reported, are excused and not misconduct. See also, *Gaborit v. Employment Appeal Board*, 734 N.W.2d 554 (Iowa App. 2007) wherein the court held an absence can be excused for purposes of unemployment insurance eligibility even if the employer was fully within its rights to assess points or impose discipline up to or including discharged for the absence under its attendance policy. For this reason, we conclude that the Employer failed to satisfy his burden of proof.

DECISION:

The administrative law judge's decision dated March 30, 2017 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was discharged for no disqualifying misconduct. Accordingly, he is allowed benefits provided he is otherwise eligible.

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Kim D. Schmett

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Ashley R. Koopmans

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James M. Strohman

AMG/fnv