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

MELINDA MARTIN	:	
	:	**HEARING NUMBER:** 13B-UI-11914
Claimant,	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
	:	
MARKETLINK 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, 96.3-7

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. A majority of the Appeal Board, one member dissenting, finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

The Employment Appeal Board would adopt and incorporate as its own the administrative law judge's Findings of Fact with the following modifications:

The Claimant had a difficult time letting the Employer know the status of her medical condition during her stay in the hospital; but she managed to call even through the weekends. (Rec. 29:23-28:53; 20:45) However, because she was oftentimes unconscious and not clear-headed, she missed calling on a few days. On August 28th, the Claimant remained hooked up to IV's, and heart monitory; she was still 'foggy-minded' condition. (Rec. 11:53-11:50; 9:24) She was unable to remember details of her conversations with the Employer when she called in her absences.

The Claimant did not have a cell phone and oftentimes had to look up the Employer's number before she called in. (Rec. 8:34) The Claimant had never been a no call/no show in the past, nor had she ever received any prior warnings. (Rec. 26:00-25:49; 19:01-18:55; 4:17-4:01) She had always followed proper procedure for reporting her absences in the past. (Rec. 25:35-25:18: 20:14-20:02; 17:36-17:16)

REASONING AND CONCLUSIONS OF LAW:

The record clearly establishes that the Claimant was hospitalized for 10 days due to a serious illness for which she almost died. Both parties agree that Ms. Martin had always been in the habit of following the attendance reporting policy and had never received any prior reprimands for failing to comply with that policy. (Rec. 26:00-25:49; 19:01-18:55; 4:17-4:01) Her failure to call in from August 29th through the 31st was the first time she had ever violated this policy. Considering the gravity of her medical condition, and her unclear thinking throughout the duration of her ordeal, it was not unreasonable for the Claimant to eventually and inadvertently lose track of time and days. Her failure to call was not intentional, and therefore, not a voluntary quit, as she was not of sound mind at the time to be cognizant of what her attendance reporting responsibility was. "[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).

Ms. Martin lacked the requisite intent or volition to quit her employment. The fact that she did not call in according to policy is not commensurate with an intention to quit under these circumstances. In light of her medical condition, and subsequent hospitalization, it is understandable how the Claimant lacked volition to choose to act one way or another. The court in Quenot v. Iowa Department of Job Service, 339 N.W.2d 624 (Iowa App. 1983) held that a Claimant who had a nervous breakdown, quit and ended up hospitalized lacks volition to form requisite intention to quit. Thus, Claimant's separation comes under purview of Iowa Code section 96.5(1)"d."

Iowa Code section 96.5(1) "d" (2011) 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. But the individual shall not be disqualified if the department finds that:
>
> The individual left employment because of illness, injury or pregnancy upon the advice of a licensed and practicing physician, and upon knowledge of the necessity for absence immediately notified the Employer, or the Employer consented to the absence, and after recovering from the illness, injury or pregnancy, when recovery was certified by a licensed and practicing physician, the individual returned to the Employer and offered to perform services and the individual 's regular work or comparable suitable work was not available, if so found by the department, provided the individual is otherwise eligible.

Here, Ms. Martin's failure to call in did not establish an intention to sever her employment relationship. For her not to call was highly unusual based on her past history. We can reasonably assume that Ms. Martin's failure to call in was due to her incapacity to follow through with what was expected of her. There is nothing in the record to support that the Claimant had anyone else available to call in her stead, or prod her to keep contact with the Employer. Thus, she was left up to her own devices, which obviously fell short of well-reasoned thought or calculation. The record shows that once she was released, she immediately returned to offer her services within the meaning of the aforementioned statute, but was not allowed to continue her employment relationship. Based on this record, we conclude that the Claimant did not quit her employment and should be qualified to receive benefits.

This case could also be analyzed as a discharge for which misconduct must be established. We find that the record is void of any evidence that her failure to report her absences was an intentional disregard of the Employer's interests. In fact, case law supports that given her medical condition, Ms. Martin's final act would not be considered misconduct. The court in Roberts v. Iowa Department of Job Service, 356 N.W.2d 218 (Iowa 1984) held that a Claimant who is unable to report due to hospitalization for mental illness is not misconduct based on the involuntary nature of her action. Even though the Claimant was not hospitalized for mental illness, her mental incapacity is comparable in that her action was most certainly involuntary.

DECISION:

The administrative law judge's decision dated November 2, 2012 is **REVERSED**. The Claimant did not voluntary quit, but was discharged for no disqualifying reason. Accordingly, the Claimant is allowed benefits provided she is otherwise eligible.

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John A. Peno

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Cloyd (Robby) Robinson

DISSENTING OPINION OF MONIQUE F. KUESTER:

I respectfully dissent from the majority decision of the Employment Appeal Board; I would affirm the decision of the administrative law judge in its entirety.

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Monique F. Kuester

AMG/fnv