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

MARIA E MENDOZA	:	
	:	**HEARING NUMBER:** 13B-UI-04479
Claimant,	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
	:	
SWIFT PORK CO	:	
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. A majority of the Appeal Board, one member dissenting, finds it cannot affirm the administrative law judge's decision. The majority of the Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

Maria Mendoza (Claimant) worked for Swift Pork Co. (Employer) as a full-time laborer from 2007 until she was separated on October 24, 2012. After missing excused days in July, 2012 the Claimant was granted two weeks' vacation, during which time she went to Mexico to receive medical treatment. She continued to call in sick during the period that she was too sick to work. The Claimant continued to call in work through October 22. She did not call on the 23rd because she was unable to speak, and so her mother called for her thereafter. The calls stopped once the Claimant's father was told that there was no further need to call in as the Claimant was considered to have quit. On November 24, 2012, the Saturday of Thanksgiving weekend, the Claimant was released to work. She returned to work on Monday the 26th but was told there was no job for her.

REASONING AND CONCLUSIONS OF LAW:

Quitting: 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. 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).

Quits for non-work health reasons are not attributable to the Employer. Such quits are disqualifying. Yet a claimant may, under the right circumstances, requalify for benefits in such cases. This requalification is set out in Iowa Code §96.5(1)(d):

> [T]he individual shall not be disqualified if the department finds that:
> …
> d. 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.

See also 871 IAC 24.25(35).

No Quit Proven: The Claimant was approved for vacation, and while gone learned that she was seriously ill and could not work. 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 have found credible the Claimant's first-hand description of her efforts to keep the Employer informed of her need to be off work due to her illness. We have concluded that she informed the

Employer of her need to be off work and continually called in through October 22, until she was physically no longer able to call in. Her mother then did this chore for her thereafter until her father was told calling in was not required since the Claimant no longer had a job. The Employer failed to prove that the Claimant quit under these circumstances. As noted above, quitting requires an intent to quit and an overt act of quitting. The Employer has failed to establish either. A sick person who calls in continually for months is not someone with an intent to quit. This is someone with an intent to stay an employee so that she can return when she is well. The evidence is clear that the Claimant didn't want to quit, and indeed did come back once fully released. As for an overt act, all she did was inform the Employer that she needed more time off, and could not work her old job. This is not an overt act of quitting. While the three day no call/no show rule applies even where there is no intent to quit, we have specifically found that the Claimant did call in the days in question and was not no call/no show. The Claimant is therefore not disqualified for quitting.

Requalification: Even if we concluded that the Claimant quit, still the Claimant would not be disqualified. Given that we have found that the Claimant did personally call through October 22, and had someone call for her thereafter, the best case scenario for the Employer is that the Claimant was unable to return to work, and sought more leave, and that this request for more leave is some sort of quit. Let us now assume this is true. This would mean that the Claimant "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…" Iowa Code §96.5(1)(d). If this is a quit then the Claimant requalified on November 26 when she "returned to the employer and offered to perform services…" Iowa Code §96.5(1)(d). Since the Employer told the Claimant no work was available, even if we found a quit we would grant benefits from the date of her return on the 26th of November.

In fact, even if the Claimant failed to call in on October 20, 22 and 23rd as claimed by the Employer still we would allow benefits. This is because this three day no call/no show in violation of company rule is deemed by regulation to be a quit without good cause attributable to the Employer. 871 IAC 24.25(4). It is not deemed to bar a claimant from ever receiving benefits. Here the Claimant did return immediately upon being released, and was not allowed to return. This requalifies the Claimant under Iowa Code §96.5(1)(d). It does not matter if the Claimant quit without good cause attributable to the Employer, or can be deemed to so have quit, because 96.5(1)(d) requalifies people who have quit for health reasons not attributable to the employer, if their physicians would not allow them to work. Clearly this Claimant, hospitalized for throat surgery, was not able to work and so if she failed to call, that is, if she can be deemed to have quit, then the quit was because her physicians would not even let her out of the hospital, much less go to work. She thus left employment because of illness upon medical advice, as the form of quitting does not alter the reasons for the quit. *See Barber v. EAB*, No. 0-820 (Iowa App. 11/24/2010)(where quit is for change in contract claimant not disqualified even if form of the quit is 3-day no call/no show). The only tricky part is whether the Claimant satisfied the necessary notification requirement before leaving. Of course, we have found that she, or others on her behalf, did call in on the days before the 24th and so have found that satisfied the requirement. But, for present purposes, we also would conclude that even if the Claimant had not called in these days, still the Employer would have sufficient notice of her reasons for being gone. She had been calling in her absence for *months*, and the Employer clearly knew she suffered from a very serious condition. If she then ends up quitting because

unable to return from leave, we do not think, under the specific circumstance of this case, that she has to call in yet again to say that she was indeed still seriously ill. *C.f. Floyd v. Iowa Dept. of Job Service,* 338 N.W.2d 536, 538 (Iowa App., 1983) ("His employer knew that he was ill, and had fair warning that petitioner might be absent for an extended period of time due to that illness."). For the purposes of Iowa Code §96.5(1)(d) the Employer had sufficient notice of why the Claimant was gone, and the Claimant certainly did return as soon as she was able. Thus even if the Claimant did not call in on the 20-23rd still we would allow benefits as of the date she returned with a full release.

We note that the Claimant did not apply for benefits until after the date she returned to offer her services, and so allowance from that date means the Claimant receives benefits from her original claim date forward.

DECISION:

The administrative law judge's decision dated May 23, 2013 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.

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John A. Peno

_____
Cloyd (Robby) Robinson

DISSENTING OPINION OF MONIQUE 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

RRA/fnv