

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

IRMA M VERDINEZ DIAZ

Claimant,

and

SWIFT PORK COMPANY

Employer.

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HEARING NUMBER: 12B-UI-16576

**EMPLOYMENT APPEAL BOARD
DECISION**

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, 96.3-7

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE DENIED

The Claimant appealed this case to the Employment Appeal Board. Two members of the Employment Appeal Board reviewed the entire record. Those members are not in agreement. Monique F. Kuester would affirm and John A. Peno would reverse the decision of the administrative law judge.

Since there is not agreement, the decision of the administrative law judge is affirmed by operation of law. The Findings of Fact and Reasoning and Conclusions of Law of the administrative law judge are adopted by the Board and that decision is **AFFIRMED** by operation of law. See, 486 IAC 3.3(3).

A portion of the claimant's appeal to the Employment Appeal Board consisted of additional evidence which was not contained in the administrative file and which was not submitted to the administrative law judge. While the appeal and additional evidence were reviewed, the Employment Appeal Board, in its discretion, finds that the admission of the additional evidence is not warranted in reaching today's decision.

Monique F. Kuester

DISSENTING OPINION OF JOHN A. PENO:

I respectfully dissent from the decision of the Employment Appeal Board; I would reverse the decision of the administrative law judge. The employer terminated the claimant based on a no fault point system for excessive absenteeism. The final act involved the claimant reporting her absence for illness; however, the claimant's call was late. The record establishes that most of the claimant's absences were due to illness for which the claimant provided medical documentation, i.e., a doctor's note.

I disagree with the administrative law judge's finding that the final act was not for illness. The record establishes that although the claimant's call was late, the absence was for illness. (Tr.1, lines 33-34) I also disagree that the claimant had a history of unexcused absences. Of the absences the employer cited, only one was for personal business on January 18th, 2012. The remaining absences would be considered excused based on 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 that are properly reported are excused and not misconduct. I would also note that the employer's no fault attendance policy or point system is not dispositive of the determination of a claimant's eligibility for benefits. See, *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. Based on this record, I would conclude that the employer failed to satisfy their burden of proof. Benefits should be allowed provided the claimant is otherwise eligible.

John A. Peno

AMG/lms