

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

ADAN I GARCIA
Claimant

APPEAL NO: 11A-UI-16530-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

FONDA WATERING HOLE
Employer

**OC: 11/06/11
Claimant: Appellant (4/R)**

Section 96.4-3 – Able and Available
Section 96.5-1 – Voluntary Leaving
Section 96.6-2 – Timeliness of Appeal

STATEMENT OF THE CASE:

Adan I. Garcia (claimant) appealed a representative's December 13, 2011 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits in connection with his employment with Fonda Watering Hole (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on January 26, 2012. The claimant participated in the hearing. Natalie Kelly appeared on the employer's behalf. During the hearing, Exhibit A-1 was entered into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Was the claimant's appeal timely or are there legal grounds under which it should be treated as timely?

Was the claimant eligible for unemployment insurance benefits by being able and available for work?

Did the claimant voluntarily quit for a disqualifying reason?

FINDINGS OF FACT:

The claimant started working for the employer on or about November 1, 2011. He worked part-time (15 – 20 hours per week) as a cook at the employer's bar/restaurant. His last day of work was on or about November 18, 2011. The claimant and his family left Iowa on or about November 22 to go to Texas to visit family.

The representative's decision had been mailed to the claimant's last known address of record on December 13, 2011. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by December 23, 2011. The claimant did not return to Iowa until on or about December 23. He did not check his post office box for mail until on or about

December 26, at which time the claimant received the decision. The appeal was not filed until December 29, 2011, which is after the date noticed on the disqualification decision.

After the claimant returned to Iowa, he spoke to his landlord, who was also an owner of the employer; the owner advised the claimant to go up to the business and speak to the manager, Kelly, about getting some hours. The claimant was aware that Kelly's children were home for the holidays and were working hours at the business, and so he decided to wait until after the holidays to approach Kelly about returning to work. However, on or about January 1, 2012, the claimant got a call from another prior employer who offered the claimant more hours, so the claimant accepted that offer and returned to working with that employer, and decided not to return to his employment with the employer. Kelly observed him working there shortly after January 1, 2012.

The claimant had established an unemployment insurance benefit year effective November 6, 2011 because of a separation from a different employer. His weekly benefit amount was calculated to be \$196.00. This was determined based upon the claimant's base period wages; the claimant's base period for his claim year was the third quarter 2010 through the second quarter 2011. The claimant had weeks after November 6 and while he was working for the employer in which he made weekly claims but reported earning no wages.

REASONING AND CONCLUSIONS OF LAW:

The preliminary issue in this case is whether the claimant timely appealed the representative's decision. Iowa Code § 96.6-2 provides that unless the affected party (here, the claimant) files an appeal from the decision within ten calendar days, the decision is final and benefits shall be paid or denied as set out by the decision.

The ten calendar days for appeal begins running on the mailing date. The "decision date" found in the upper right-hand portion of the representative's decision, unless otherwise corrected immediately below that entry, is presumptive evidence of the date of mailing. *Gaskins v. Unempl. Comp. Bd. of Rev.*, 429 A.2d 138 (Pa. Comm. 1981); *Johnson v. Board of Adjustment*, 239 N.W.2d 873, 92 A.L.R.3d 304 (Iowa 1976).

Pursuant to rules 871 IAC 26.2(96)(1) and 871 IAC 24.35(96)(1), appeals are considered filed when postmarked, if mailed. *Messina v. IDJS*, 341 N.W.2d 52 (Iowa 1983).

The record in this case shows that more than ten calendar days elapsed between the mailing date and the date this appeal was filed. The Iowa court has declared that there is a mandatory duty to file appeals from representatives' decisions within the time allotted by statute, and that the administrative law judge has no authority to change the decision of a representative if a timely appeal is not filed. *Franklin v. IDJS*, 277 N.W.2d 877, 881 (Iowa 1979). Compliance with appeal notice provisions is jurisdictional unless the facts of a case show that the notice was invalid. *Beardslee v. IDJS*, 276 N.W.2d 373, 377 (Iowa 1979); see also *In re Appeal of Elliott*, 319 N.W.2d 244, 247 (Iowa 1982). The question in this case thus becomes whether the appellant was deprived of a reasonable opportunity to assert an appeal in a timely fashion. *Hendren v. IESC*, 217 N.W.2d 255 (Iowa 1974); *Smith v. IESC*, 212 N.W.2d 471, 472 (Iowa 1973). The record shows that the appellant did not have a reasonable opportunity to file a timely appeal.

The administrative law judge concludes that the appellant's failure to file a timely appeal within the time prescribed by the Iowa Employment Security Law was due to Agency error or

misinformation or delay or other action of the United States Postal Service pursuant to 871 IAC 24.35(2), or other factor outside of the claimant's control. The administrative law judge further concludes that the appeal should be treated as timely filed pursuant to Iowa Code § 96.6-2. Therefore, the administrative law judge has jurisdiction to make a determination with respect to the nature of the appeal. See, *Beardslee*, supra; *Franklin*, supra; and *Pepsi-Cola Bottling Company v. Employment Appeal Board*, 465 N.W.2d 674 (Iowa App. 1990).

With respect to any week in which unemployment insurance benefits are sought, in order to be eligible the claimant must be able to work, is available for work, and is earnestly and actively seeking work. Iowa Code § 96.4-3. To be found able to work, "[a]n individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood." *Sierra v. Employment Appeal Board*, 508 N.W.2d 719, 721 (Iowa 1993); *Geiken v. Lutheran Home for the Aged*, 468 N.W.2d 223 (Iowa 1991); 871 IAC 24.22(1).

A person who is out of state on personal or family business is not able and available to work during that period. 871 IAC 24.23(25). Therefore, the claimant was not able and available for work for the benefit week ending November 26 through the benefit week ending December 24. A person who does not work for a particular week after being on a leave of absence because he does not make himself available to his employer to be scheduled for work is not eligible for benefits for that week. 871 IAC 24.23(10), (16). As a result, since the claimant did not seek hours for the week ending December 31 upon speaking to the employer's owner on or about December 23 and being directed to seek hours, he is not eligible to receive unemployment insurance benefits for the benefit week ending December 31. As of January 1, 2012, the claimant became able and available for work.

If the claimant voluntarily quit his employment, he is not eligible for unemployment insurance benefits unless it was for a non-disqualifying reason. Iowa Code § 96.5-1. This can apply also to a person who quits employment even if that person is otherwise eligible to receive unemployment insurance benefits based on employment prior to the employment he subsequently decides to leave. *Taylor v. Iowa Department of Job Service*, 362 N.W.2d 534 (Iowa 1985). However, one reason a voluntary quit is non-disqualifying is if an employee quits for the reason of accepting and entering into new employment. Iowa Code § 96.5-1-a. Under this circumstance, the employer's account is also not subject to charge.

The claimant did voluntarily quit by not returning to work with the employer in order accept a bona fide offer of other employment with another employer. The claimant is not disqualified from receiving benefits as a result of his quit from the employer in this case, but the employer's account will not be charged.

The unemployment insurance law provides that a claimant is deemed partially unemployed if he has been permanently or temporarily separated from one employer and earns less than his weekly benefit amount plus \$15.00 in other employment. Iowa Code § 96.19-38-b; see also Iowa Code § 96.3-3. To be eligible for benefits for any particular week, the claimant must file a weekly claim for that week reporting his wages from all employers earned (not paid) for that week; the amount of his eligibility will then be determined pursuant to the formula set out by the statute. 871 IAC 24.52(8); Iowa Code § 96.3-3. Some evidence was provided that the claimant was receiving income from the employer that should have been reported to potentially reduce his benefits. The administrative law judge is without jurisdiction to make a ruling on this issue. This matter is remanded to the Claims Section to determine if the claimant was receiving wages that he failed to report. If the claimant believes he qualifies and wishes to seek partial

unemployment insurance benefits under his new employment, he will need to reopen his claim and begin making weekly claims reporting his currently earned wages.

DECISION:

The appeal in this case is treated as timely. The representative's December 13, 2011 decision (reference 01) is modified in favor of the claimant. The claimant voluntarily left his employment effective January 1, 2012, but the quit was not disqualifying. The employer's account will not be charged. The claimant was not able to work and available for work effective the benefit weeks ending November 27 through December 31, 2011, and was not eligible to receive benefits for that period. The claimant became able and available for work as of January 1, 2012, and as of that date the claimant is eligible for unemployment insurance benefits, provided he is otherwise eligible. The claimant was able and available for work for the period from November 6 through November 19, 2011. Benefits are allowed during that period; however, the matter is remanded to the Claims Section for investigation and determination as to whether there were unreported wages during that period that could affect the amount of the claimant's benefits.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/kjw