IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

THOMAS R WALSH Claimant **CAMSO MANUFACTURING USA LTD** Employer	**APPEAL NO. 18A-UI-06736-B2T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 05/20/18** **Claimant: Appellant (1)**

Iowa Code § 96.6-2 – Timeliness of Appeal
Iowa Code § 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from the June 5, 2018, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on July 9, 2018. The claimant did participate and had witness Dawn Hedren. The employer did participate through Ranae Bettcher, Pat Conley, Joann Kinsel and Brian Crist. Claimant's Exhibits A-C and Employer's Exhibits 1-3 were admitted to the record.

ISSUES:

Whether the appeal is timely?

Whether claimant was discharged for misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: A decision was mailed to the claimant's last known address of record on June 5, 2018. Claimant did not receive the decision. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by June 15, 2018. The appeal was not filed until June 20, 2018, which is after the date noticed on the disqualification decision. Claimant stated that he normally does not have problems with his mail, but did not receive the decision entered by the fact finder.

Claimant received rashes while working for employer that caused claimant to miss a number of days of work. Claimant had worked only 1 ½ days for employer since April 18, 2018. Claimant returned to work on May 7, 2018 and came back on May 8, 2018, only to be sent home for the recurrence of his rash. Claimant's doctor sent a note to employer on May 8, 2018, stating that claimant would be off work on May 8 and May 9, 2018.

Claimant was to return to work on May 10, 2018. Claimant did not come to work on that date. Employer stated that they called claimant on May 10 at 7:53 a.m. and left a message asking claimant to return a call to employer. Employer did not send forth the document but read off an

alleged copy of the May 8, 2018 doctor's note where employer had taken notes regarding her call. Claimant denied that he ever received a message from employer stating that he certainly would have returned a call to employer had he received a message.

Not only did claimant not return the message sent by employer asking about his extended absence, but claimant also did not do anything to ensure that claimant's doctor had granted claimant an extension to his release. Employer had no idea that claimant had his time off extended by employer on the dates of May 10 and May 11, 2018.

After claimant received the copy of the termination letter sent to him on May 14, 2018. Claimant immediately went to the doctor and received an excuse for claimant's absences from work on May 14 through May 18, 2018. This note did not exclude claimant's absence on May 10 and May 11, 2018.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.6(2) provides:

> 2. Initial determination. A representative designated by the director shall promptly notify all interested parties to the claim of its filing, and the parties have ten days from the date of mailing the notice of the filing of the claim by ordinary mail to the last known address to protest payment of benefits to the claimant. The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed. The claimant has the burden of proving that the claimant meets the basic eligibility conditions of section 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to section 96.5, except as provided by this subsection. The claimant has the initial burden to produce evidence showing that the claimant is not disqualified for benefits in cases involving section 96.5, subsections 10 and 11, and has the burden of proving that a voluntary quit pursuant to section 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 1, paragraphs "a" through "h". Unless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision. If an administrative law judge affirms a decision of the representative, or the appeal board affirms a decision of the administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision is finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

Iowa Code section 96.5(2)a provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
>
> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:

a. The disqualification shall continue until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

Iowa Admin. Code r. 871-24.32(1)a provides:

Discharge for misconduct.

(1) Definition.

a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.,* 275 N.W.2d 445, 448 (Iowa 1979).

The ten calendar days for appeal begin 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 Iowa Admin. Code r. 871-26.2(96)(1) and Iowa Admin. Code r. 871-24.35(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 Supreme 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, as claimant did not receive the decision denying his benefits.

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

misinformation or delay or other action of the United States Postal Service pursuant to Iowa Admin. Code r. 871-24.35(2). The administrative law judge further concludes that the appeal is therefore deemed to be timely filed pursuant to Iowa Code Section 96.6-2, and the administrative law judge retains jurisdiction to make a determination with respect to the nature of the appeal. See, *Beardslee v. IDJS*, 276 N.W.2d 373 (Iowa 1979) and *Franklin v. IDJS*, 277 N.W.2d 877 (Iowa 1979).

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982), Iowa Code § 96.5-2-a.

In order to establish misconduct as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. Rule 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa Ct. App. 1986). The conduct must show a willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or the employee's duties and obligations to the employer. Rule 871 IAC 24.32(1)a; *Huntoon* supra; *Henry* supra. In contrast, mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not deemed misconduct within the meaning of the statute. Rule 871 IAC 24.32(1)a; *Huntoon* supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa Ct. App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *State v. Holtz*, Id. In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz*, Id. Here, the testimony of employer's witness stating that she left a message for claimant to contact employer on May 10, 2018 was augmented by her statement that she read that she left a message on the document where she also wrote down the time of the call. Claimant, on the other hand, offered no such support of his claim of not receiving a message. This might not have been determinative of the separation issue except for the fact that claimant did not check with his doctor's office either to ensure that they'd forwarded a new note to employer excusing claimant for additional days. Claimant neither called employer nor his doctor to make sure that documentation was received allowing claimant to be absent past the dates allowed in the May 8, 2018 doctor's excuse.

The gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct. The lack of a current warning may detract from a finding of an intentional policy violation. Excessive absences are not misconduct unless unexcused. Absences due to properly reported illness can never constitute job misconduct since they are not volitional. The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The Iowa Supreme Court has opined that one unexcused absence is not misconduct even when it followed nine other excused absences and was in violation of a direct order. *Sallis v. EAB*, 437 N.W.2d 895 (Iowa 1989). *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187 (Iowa 1984), held that the absences must be both excessive and unexcused. The Iowa Supreme Court has held that excessive is more than one. Three incidents of tardiness or absenteeism after a warning has been held misconduct. *Clark v. Iowa Department of Job Service*, 317 N.W.2d 517 (Iowa Ct. App. 1982). While three is a reasonable interpretation of excessive based on current case law and Webster's Dictionary, the interpretation is best derived from the facts presented. In this matter, the evidence established that claimant was discharged for an act of misconduct when claimant violated employer's policy concerning absenteeism. Employer continued to work with claimant while claimant attempted to find the root of his allergic reaction.

The last incident, which brought about the discharge, constitutes misconduct because claimant has to bear some responsibility for not maintaining contact with either his employer or his doctor. His negligence in doing so manifests culpability on claimant's part. The administrative law judge holds that claimant was discharged for an act of misconduct and, as such, is disqualified for the receipt of unemployment insurance benefits.

DECISION:

The June 5, 2018, reference 01, decision is affirmed. Although the appeal in this case was deemed timely, the decision of the representative remains in effect as claimant was dismissed for misconduct based on his absenteeism and being a no-call/no-show from work on multiple days.

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Blair A. Bennett
Administrative Law Judge

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Decision Dated and Mailed

bab/scn