IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JARROD M HESSE
Claimant

PROGRESS INDUSTRIES
Employer

APPEAL NO: 12A-UI-15017-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 11/04/12
Claimant: Appellant (1)

Section 96.5-2-a – Discharge
Section 96.6-2 - Timeliness of Appeal

STATEMENT OF THE CASE:

Jarrod M. Hesse (claimant) appealed a representative's November 30, 2012 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment from Progress Industries (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on January 31, 2013. The claimant participated in the hearing. Kelly Decker appeared on the employer's behalf and presented testimony from one other witness, Rachel McDermott. During the hearing, Exhibit A-1 and Employer's Exhibit One were 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 discharged for work-connected misconduct?

OUTCOME:

Affirmed. Benefits denied.

FINDINGS OF FACT:

The representative's decision was mailed to the claimant's last-known address of record on November 30, 2012. The claimant received the decision. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by December 10, 2012, a Wednesday. An appeal was not received until the claimant mailed an appeal postmarked on December 21, 2012, which is after the date noticed on the disqualification decision. The claimant testified that he had written an appeal letter on December 1 and that he had taken it to a local grocery store to have it faxed to the designated fax number for the Appeals Section. He watched while the store employee placed the letter into the fax machine and presumably entered the Appeals Section's fax number. The claimant paid for the service and left; the store did not offer the claimant a fax transmission confirmation sheet. It is unknown whether the

failure of the fax to be received was due to an error of the grocery store employee or machine, or by an Agency employee or machine.

The claimant started working for the employer on January 19, 2009. He worked full-time as overnight aide at the employer's residential site. His last day of work was November 7, 2012. The employer discharged him on that date. The stated reason for the discharge was falsification of logs by copying and pasting into the logs.

On or about November 6 the employer found information indicating that the claimant had been performing copy and paste functioning to document services. As a result, the employer performed log review of the logs of services provided. The employer found that the claimant had copied and pasted service information into a log on November 5, essentially predocumenting services before the services were rendered. Upon further review the employer found that there were additional instances in October where the claimant had copied and pasted information and predocumented services.

The employer considers predocumentation and copying and pasting to be falsification of records. Predocumentation of services is also prohibited. On May 3, 2012 the claimant had been issued a written warning for copying and pasting from previous logs; he was specifically instructed that he was to "create a brand new log each shift and use no information from any of his previous logs with the use of copying and pasting."

As a result of the discovery that the claimant was again predocumenting and utilizing copying and pasting, the employer discharged the claimant.

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 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 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).

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. IDJS*, 321 N.W.2d 6 (Iowa 1982); Iowa Code § 96.5-2-a.

In order to establish misconduct such 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. 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 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 of the employee's duties and obligations to the employer. 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 to be deemed misconduct within the meaning of the statute. 871 IAC 24.32(1)a; *Huntoon*, supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

The claimant's predocumentation and use of copy and pasting in the service logs after being warned he could not do so shows a willful or wanton disregard of the standard of behavior the employer has the right to expect from an employee, as well as an intentional and substantial disregard of the employer's interests and of the employee's duties and obligations to the employer. The employer discharged the claimant for reasons amounting to work-connected misconduct.

DECISION:

The appeal in this case is treated as timely. The representative's November 30, 2012 decision (reference 01) is affirmed. The employer discharged the claimant for disqualifying reasons. The claimant is disqualified from receiving unemployment insurance benefits as of November 7, 2012. This disqualification continues until the claimant has been paid ten times his weekly benefit amount for insured work, provided he is otherwise eligible. The employer's account will not be charged.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

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