IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

DANIEL W DEPARDO
Claimant

1ST CLASS STAFFING LLC
Employer

APPEAL NO: 14A-UI-02609-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 09/08/13
Claimant: Appellant (1)

Section 96.6-2 - Timeliness of Appeal
Section 96.5-1 – Voluntary Leaving

STATEMENT OF THE CASE:

Daniel W. DePardo (claimant) appealed a representative's February 21, 2014 decision (reference 04) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment from 1st Class Staffing, L.L.C. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on April 1, 2014. The claimant participated in the hearing. Rhonda Lane 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.

ISSUE:

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

FINDINGS OF FACT:

The representative's decision was mailed to the claimant's last-known address of record on February 21, 2014. The claimant received the decision. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by March 3, 2014, a Monday. The appeal was not filed until it was received on March 7, 2014, which is after the date noticed on the disqualification decision. The claimant had realized that the deadline for appeal was upon him. He went to a local FedEx Office store and attempted to fax an appeal. When he was unsuccessful in that attempt, he determined to send his appeal by FedEx, rather than by United States Postal Service, since he was already at the FedEx office and thought the appeal might be delivered more quickly that way. The FedEx "ship date" was March 3, 2014, but the appeal was not received at the Appeals Section until March 7.

The employer is a temporary employment firm. The claimant's first and to date only assignment with the employer began on October 24, 2013. He worked full time as a forklift operator on the third shift at the employer's East Moline, Illinois business client. His last day on the assignment

was the shift that started at 10:00 p.m. on January 9, 2014. The assignment ended because the claimant determined to quit the assignment.

The claimant's shift was originally going to be from 10:00 p.m. to 6:00 a.m. from Sunday night through Friday morning. Shortly after starting the work, the business client began to require overtime by starting to work at 8:00 p.m., and sometimes adding a shift from 10:00 p.m. to 6:00 a.m. from Friday night into Saturday mornings. The claimant was unhappy about this. The claimant returned from a holiday shutdown on or about January 5, and at that point the schedule was back to a 10:00 p.m. start. However, at the shift start up meeting on January 9 the employees were informed that they would have an overtime shift at 10:00 p.m. on January 10, and that the next week they would be returning to working the ten-hour shifts starting at 8:00 p.m.

Primarily because of the additional overtime requirement, but also because of concern over how a newly hired employee was being treated on January 9 and because of some safety concerns largely relating to large snow piles, the claimant determined to quit the assignment. He clocked out and left at about 10:30 p.m.

On January 10 the business client informed Lane, the on-site employer representative, that the claimant had walked off the job the prior night. Lane called the claimant. He returned the call and confirmed that he had quit. He mentioned concerns about the snow piles to Lane in December, but had not advised her that there was still a problem in January.

REASONING AND CONCLUSIONS OF LAW:

If a party fails to make a timely appeal of a representative's decision and there is no legal excuse under which the appeal can be deemed to have been made timely, the decision as to the merits has become final and is not subject to further review. 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 then 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).

A party does not have a reasonable opportunity to file a timely appeal if the delay is due to Agency error or misinformation or to delay or other action of the United States postal service. 871 IAC 24.35(2). Failing to read and follow the instructions for filing an appeal is not a reason outside the appellant's control that deprived the appellant from having a reasonable opportunity to file a timely appeal. The appellant did have a reasonable opportunity to file a timely appeal.

In this case, the appeal was not received at the Appeals Section by the deadline for the appeal. The statute provides for an appeal which is not received by the deadline to be treated as timely if the appeal is postmarked by the United States Postal Service on or by the deadline. However, in this case the claimant did not use the postal service and his appeal does not have a postmark. It has been found that a mark other than by the United States Postal Service does not have the same effect; in *Pepsi-Cola Bottling Company v. Employment Appeal Board*, 465 N.W.2d 674 (Iowa App. 1990), where there was a conflict between a postage meter mark and the United States Postal Service postal service postmark, it was determined that the United States Postal Service postmark is controlling. The claimant did not ensure that his appeal was either received by the Appeals Section by the deadline, or that it would be postmarked by the United States Postal Service by that date; there is no legal provision to accept shipping by another entity on the deadline for appeal to be treated the same as if it had been postmarked by the United States Postal Service.

The administrative law judge concludes that failure to file a timely appeal within the prescribed time was not due to a legally excusable reason so that it can be treated as timely. The administrative law judge further concludes that because the appeal was not timely, the administrative law judge lacks jurisdiction to make a determination with respect to the nature of the appeal, regardless of whether the merits of the appeal would be valid. See, *Beardslee*, supra; *Franklin*, supra; and *Pepsi-Cola Bottling Company v. Employment Appeal Board*, 465 N.W.2d 674 (Iowa App. 1990).

However, in the alternative, even if the appeal were to be deemed timely, the administrative law judge would affirm the representative's decision on the merits. The claimant has the burden of proving that the voluntary quit was for a good cause that would not disqualify him. Iowa Code § 96.6-2. Leaving because of unlawful, intolerable, or detrimental working conditions would be good cause. 871 IAC 24.26(3), (4). While the claimant's work situation was perhaps not ideal, he has not provided sufficient evidence to conclude that a reasonable person would find the employer's work environment detrimental or intolerable. *O'Brien v. Employment Appeal Board*, 494 N.W.2d 660 (Iowa 1993); *Uniweld Products v. Industrial Relations Commission*, 277 So.2d 827 (FL App. 1973). The claimant has not satisfied his burden. Benefits are denied.

DECISION:

The representative's February 21, 2014 decision (reference 04) is affirmed. The appeal in this case was not timely, and the decision of the representative has become final and remains in full force and effect. Benefits are denied.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

ld/pjs