

**IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI**

**Appeal Number: 04A-UI-00545-DW
OC 12/22/02 R 02
Claimant: Appellant (1)**

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319.**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

**ZARIF PAJAZETOVIC
1940 NW 82ND ST #17
CLIVE IA 50325**

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal are based.

**TITAN TIRE CORPORATION
2345 E MARKET ST
DES MOINES IA 50317**

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

**ROBERT E TUCKER
ATTORNEY AT LAW
7109 HICKMAN RD
DES MOINES IA 50322**

(Administrative Law Judge)

(Decision Dated & Mailed)

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

STATEMENT OF THE CASE:

Zarif Pajazetovic (claimant) appealed a representative’s November 7, 2003 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits, and the account of Titan Tire Corporation (employer) would not be charged because the claimant had been discharged for disqualifying reasons. After hearing notices were mailed to the parties’ last-known addresses of record, an in-person hearing was held on March 4, 2004. The claimant participated in the hearing with his attorney, Robert Tucker. Ron Jolsen was subpoenaed by the claimant and appeared. Zeljka Dravavica translated the hearing. Joyce Kain, the human resource manager, Doug Laridsen, a supervisor, and Quy Phan, the claimant’s supervisor, appeared on the employer’s behalf. During the hearing, Claimant’s Exhibit A, B, C and D and Employer’s Exhibits One and Two were offered and admitted as 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:

Did the claimant file a timely appeal or establish a legal excuse for filing a late appeal?

Did the employer discharge him for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on July 22, 1998. He worked as a full-time pellet jeep driver. Prior to early October 2003, the claimant worked the 7:00 a.m. to 3:00 p.m. shift. The claimant returned to work on October 8 after being on a 12-week medical leave of absence. When the claimant returned to work he was assigned the 11:00 p.m. to 7:00 a.m. shift. Phan was the claimant's supervisor on this shift.

The claimant received a copy of the employer's handbook on July 22, 1998. The handbook informs employees that sleeping during work hours can result in disciplinary action, including termination without a prior warning.

After the claimant returned to work on October 8, Phan observed him sleeping during his shift. Phan gave the claimant verbal warnings that he could not sleep at work. Phan only gave the claimant verbal warnings the first week the claimant returned to work because Phan understood it could take the claimant some time to adjust to the new work hours. Phan considered the claimant a good worker. Phan warned the claimant that if he continued to sleep during his shift, Phan would not be lenient the second week.

On October 15, Phan observed the claimant on his forklift with his eyes closed, in a reclining position and with his hands behind his head. Phan concluded the claimant was again sleeping during his shift. Phan then walked from the second floor where the claimant was to first floor and asked Lauridsen to come with him. Phan and Lauridsen also had Jolsen, a union steward, to go with them to second floor. When the three men returned to the second floor, Lauridsen, Jolsen and Phan observed the claimant in the same position as Phan had seen him a few minutes earlier. The employer noticed rubber pellets were overflowing the bin they were being loaded into. Lauridsen and Jolsen observed the claimant between 30 seconds and two minutes. During this time, the claimant did not acknowledge anyone until Jolsen honked the horn on the claimant's forklift. After the horn sounded the claimant opened his eyes. All three men concluded the claimant had been sleeping on the job around 5:50 a.m.

Initially, the employer gave the claimant a form indicating he was suspended until he met with Kain. The claimant met with Kain later that morning. Based on Phan's report and the confirming observations from Lauridsen and Jolsen, the employer concluded the claimant had been sleeping during his work shift. The employer discharged the claimant because his supervisor warned him just before October 15 that he could not sleep while working and the claimant continued to do so. The employer discharged the claimant on October 15, 2003.

The claimant established a claim for unemployment insurance benefits during the week of December 22, 2002. He reopened his claim during the week of October 12, 2003. On November 7, 2003 a representative's decision was mailed to the claimant and employer. The decision indicated the claimant was not qualified to receive unemployment insurance benefits.

The claimant does not remember receiving the decision until early January 2004. The claimant does not read English and does not understand English. He had a high school relative read the decision and translate it. The claimant did not understand what the word appeal meant.

On January 16, 2004, the claimant contacted his attorney for the first time and brought the November 7, 2003 decision with him. The claimant followed his attorney's advice and immediately went to his local Workforce office and filed an appeal on January 16, 2004.

REASONING AND CONCLUSIONS OF LAW:

Unless the claimant or other interested party, after notification or within ten calendar days after a representative's decision is mailed to the parties' last-known address, files an appeal from the decision, the decision is final. Benefits shall then be paid or denied in accordance with the representative's decision. Iowa Code §96.6-2. 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 Iowa Supreme Court has ruled that appeals from unemployment insurance decisions must be filed within the time limit set by statute and the administrative law judge has no authority to review a decision if a timely appeal is not filed. Franklin v. IDJS, 277 N.W.2d 877, 881 (Iowa 1979); Beardslee v. IDJS, 276 N.W.2d 373 (Iowa 1979). In this case, the claimant's appeal was filed after the deadline for appealing expired.

The next question is whether the claimant had a reasonable opportunity to file 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 evidence establishes the claimant did not have a reasonable opportunity to file a timely appeal because he did not understand his legal rights until he contacted an attorney.

The failure to file a timely appeal was not due to any Agency error or misinformation or delay or other action of the United States Postal Service, which under 871 IAC 24.35(2) would excuse the delay in filing an appeal. In this case, the claimant established a legal excuse for filing a late appeal. Therefore, the Appeals Section has jurisdiction to make a decision on the merits of the appeal.

A claimant is not qualified to receive unemployment insurance benefits if an employer discharges him for reasons constituting work-connected misconduct. Iowa Code §96.5-2-a. The employer discharged the claimant on October 15, 2003. For unemployment insurance purposes, misconduct amounts to a deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment. Misconduct is a deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees or is an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated incidents, or good faith errors in judgment or discretion are not deemed to constitute work-connected misconduct. 871 IAC 24.32(1)(a).

The claimant testified he was not sleeping on October 15. The claimant's testimony is not credible. This conclusion is reached because three people: Jolsen, a union steward, Lauridsen, a supervisor who did not supervise the claimant, and Phan, the claimant's supervisor who warned the claimant just days prior to October 15 that he could not sleep on the job, had no motives to discharge the claimant. Their observations the morning of October 15 are consistent

with what a reasonable person would see when another person is sleeping. Phan even wanted the claimant to continue his employment because he was a good worker and showed him leniency when he first returned to work by only giving him verbal warnings. Even though the claimant asserted he was not sleeping, he also contended he had a fever the morning of October 15. The claimant, however, did not tell the employer he did not feel well. He did not tell anyone he had a fever when the Kain talked to him about sleeping on the job. A preponderance of the credible evidence establishes the claimant was sleeping on the job the morning of October 15. Since he had received warnings from Phan just prior to October 15, the claimant knew or should have known his job was in jeopardy if he continued to sleep during his shift. The evidence establishes the claimant committed work-connected misconduct on October 15, 2003. The claimant is not qualified to receive unemployment insurance benefits as of October 12, 2003.

DECISION:

The representative's November 7, 2003 decision (reference 01) is affirmed. The claimant did not file a timely appeal but established a legal excuse for filing a late appeal. The Appeals Section has jurisdiction to address the merits of his appeal. The employer discharged the claimant for reasons constituting work-connected misconduct. The claimant is disqualified from receiving unemployment insurance benefits as of October 12, 2003. This disqualification continues until he 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.

dlw/kjf