IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JOHN H BUCKENDAHL
Claimant

SALEM MANAGEMENT INC
Employer

APPEAL NO. 08A-UI-01788-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 01/06/08 R: 01
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

John H. Buckendahl (claimant) appealed a representative's February 7, 2008 decision (reference 02) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment from Salem Management, Inc. / Adventure Staffing & Professional Services (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on March 6, 2008. The claimant failed to respond to the hearing notice and provide a telephone number at which he could be reached for the hearing and did not participate in the hearing. Cyd Hall appeared on the employer's behalf. During the hearing, Exhibit A-1 was entered into evidence. Based on the evidence, the arguments of the employer, 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? Was there a disqualifying separation from employment either through a voluntary quit without good cause attributable to the employer or through a discharge for misconduct?

FINDINGS OF FACT:

The representative's decision was mailed to the claimant's last known address of record on February 7, 2008. The claimant received the decision. His appeal letter indicated that "I recently also moved because I could not afford my rent at my other place so I just received this decision, and immediately submitted my appeal." However, the letter was not dated so as to determine when the decision might have "just" been received, or whether the letter might have been written some number of days before it was mailed. Further, the claimant provided conflicting information regarding his mailing address even with the filing of his appeal; he captioned his letter with the address of 1214½ Floyd Blvd., Sioux City, IA 51105, but on his hand-written return address on the envelope containing his appeal he wrote the same 2510 Douglas, Sioux City, IA 51104 address to which the decision had been sent. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by February 17, 2008, a Sunday. The notice also provided that if the appeal date fell on a

Saturday, Sunday, or legal holiday, the appeal period was extended to the next working day, which in this case was Monday, February 18, 2008. The appeal was not filed until it was postmarked on February 20, 2008, which is after the date noticed on the disqualification decision. The claimant has not established that he did not receive the representative's decision until after the deadline for appeal.

The employer is a temporary employment firm. The claimant began taking assignments with the employer on March 13, 2007. That first assignment was with Smurfit Stone Container and continued through June 21, 2007. That assignment ended when the business client Smurfit Stone hired the claimant as its own employee. He worked directly for Smurfit Stone until approximately September 7, 2007. In another representative's decision issued on February 22, 2008 (reference 03) a decision was made that the claimant's separation from his direct employment with Smurfit Stone was due to a disqualifying voluntary quit.

The claimant then returned to taking temporary assignments with the employer, starting with a one-day assignment with a second business client on September 18. His third and final assignment with business client Sioux City Compressed Steel began on September 25, 2007. The position was to be long-term, working Monday through Friday, 7:30 a.m. to between 4:00 p.m. and 5:00 p.m. His last day on the assignment was September 28, 2007. The claimant, who had been residing in a correctional half-way house, was incarcerated in the county jail on or about September 30, 2007 for an undetermined period of time. The week of October 1 the claimant sent the employer a letter from the jail asking that this final check be sent to him at the jail. The employer has not been recontacted by the claimant. The employer considered the claimant's assignment ended by job abandonment.

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 Section 96.6-2 provides in pertinent part:

> 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. . . . 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.

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 claimant has not established that he did not have a reasonable opportunity to file a timely appeal.

871 IAC 24.35(2) provides in pertinent part:

> The submission of any payment, appeal, application, request, notice, objection, petition, report or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the department that the delay in submission was due to department error or misinformation or to delay or other action of the United States postal service or its successor.

The administrative law judge concludes that failure to file a timely appeal within the time prescribed by the Iowa Employment Security Law was not due to any Agency error or misinformation or delay or other action of the United States Postal Service pursuant to 871 IAC 24.35(2) or other factors outside the appellant's control. The administrative law judge further concludes that because the appeal was not timely filed pursuant to Iowa Code § 96.6-2, 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 v. IDJS, 276 N.W.2d 373 (Iowa 1979); 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. An employee who quits his employment, including by job abandonment, would be disqualified unless it was for a good cause attributable to the employer.

Iowa Code section 96.5-1 provides:

> An individual shall be disqualified for benefits:
>
> 1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

871 IAC 24.25 provides that, in general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. However, an employee is also deemed to have left without good cause if the employee is absent from work due to becoming incarcerated. 871 IAC 24.25(16). Benefits are denied.

DECISION:

The representative's February 7, 2008 decision (reference 02) is affirmed. The claimant's appeal was not timely. Even if the appeal were timely, the claimant is deemed to have voluntarily left his employment without good cause attributable to the employer. As of September 30, 2007, benefits are withheld until such time as the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

ld/kjw