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

JOSE A ORTIZ
211 IRVING ST #1
WATERLOO IA 50703-4431

BEEF PRODUCTS INC
891 TWO RIVERS DR
DAKOTA DUNES SD 57049-5150

Appeal Number: 06A-UI-06866-DT
OC: 05/28/06 R: 03
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.

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 is based.

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.

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

Section 96.6-2 - Timeliness of Appeal

STATEMENT OF THE CASE:

Jose A. Ortiz (claimant) appealed a representative's June 15, 2006 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment from Beef Products, Inc. (employer). Hearing notices were mailed to the parties' last known addresses of record for a telephone hearing to be held at 2:00 p.m. on July 27, 2006. The claimant received the hearing notice and responded by calling the Appeals Section on July 14, 2006. He indicated that he would be available at the scheduled time for the hearing at a specified telephone number. The administrative law judge called that number at the scheduled time for the hearing and initially reached the claimant. Through an interpreter, Ike Rocha, the administrative law judge advised the claimant that there was a bad connection on the cell phone he was attempting to use for the hearing, but that the hearing would proceed subject to the claimant's risk of losing battery or signal, and the claimant agreed. The

administrative law judge placed the claimant and interpreter on hold to contact the employer's representative and witnesses, and when the administrative law judge sought to recontact the claimant at the given number, the call went into an answering system. The claimant did not respond to the message left by the administrative law judge through the interpreter advising the claimant to call back into the Appeals Section if he still wished to participate in the hearing. Therefore, the claimant did not participate in the hearing. The employer responded to the hearing notice and indicated that Rick Wood would participate as the employer's representative. When the administrative law judge contacted Mr. Wood for the hearing and after the claimant became unavailable for the hearing, Mr. Wood agreed that the administrative law judge should make a determination based upon a review of the information in the administrative file plus his informal statement. Based on a review of the information in the administrative file, Mr. Wood's informal statement 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?

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 June 15, 2006. No evidence was provided to rebut the presumption that the claimant received the decision within a few days thereafter. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by June 25, 2006. 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, June 26, 2006. The appeal was not filed until it was hand-delivered to a local Agency office on July 5, 2006, which is after the date noticed on the disqualification decision. No explanation was offered to justify the delay.

The claimant started working for the employer on June 9, 2005. He worked full-time as a laborer on the third shift beginning at 11:30 p.m. His last day of work was May 25, 2006. The employer discharged him on May 27, 2006. The reason asserted for the discharge was excessive absenteeism and tardiness.

The claimant had numerous prior absences and tardies, including several no-call/no-shows, for which he had been given warnings, including a final warning on May 8, 2006. Call-ins for illness are to be made at least a half-hour before the start of a shift. On May 26, he called in an absence claimed to be for illness at least an hour late. When asked through an interpreter why he had not called in earlier, he responded that he had just forgotten.

REASONING AND CONCLUSIONS OF LAW:

The determinative issue in this case is whether the claimant timely appealed the representative's decision.

Iowa Code § 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 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 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 v. IDJS, 277 N.W.2d 877 (Iowa 1979); 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. Excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness cannot constitute work-connected misconduct since they are not volitional. Cosper, supra. However, the illness-related absence in this matter was not properly reported, nor was an acceptable reason provided to excuse the failure to properly report the absence. Benefits are denied.

DECISION:

The June 15, 2006 (reference 01) decision is affirmed. The appeal in this case was not timely, and the decision of the representative remains in effect. The employer discharged the claimant for disqualifying misconduct. As of May 27, 2006, 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..

ld/cs