IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

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

TODD A HENZE
Claimant

JOHN DEERE COMPANY
Employer

APPEAL NO: 19A-UI-00285-JC-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 12/17/17
Claimant: Respondent (1)

Iowa Code § 96.6(2) – Timeliness of Appeal
Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the October 26, 2018, (reference 06) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on January 29, 2019. The hearing was held jointly with Appeal 19A-UI-00286-JC-T. The claimant participated personally. The employer participated through Elizabeth DeWinter. Employer Exhibit 1 (Appeal letter) was admitted.

The administrative law judge took official notice of the administrative records including the fact-finding documents. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Is the appeal timely?
Was the claimant discharged for disqualifying job-related misconduct?
Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?
Can any charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as a machine maintenance technician and was separated from employment on September 19, 2018, when he was discharged for failure to replace a hoist safely.

On September 6, 2018, the claimant completed the work order for a hoist. In order to complete the order, the claimant had to use an impact gun to tighten the nuts/bolts. In this particular case, the claimant remembered physically tightening the nuts/bolts with the impact gun because

originally he had to go back to the ground to retrieve his John Deere issued impact gun. For unknown reasons, approximately six days later, a nut from the hoist was found by Jeff Jones, which implied the nut had not been properly screwed on. The claimant denied failing to secure the hoist but was discharged, based upon prior disciplinary history. Most recently the claimant had been given a last chance warning for smoking in the Gator vehicle in August 2018. He also had a prior warning in July 2018 for sleeping on the job. The claimant had no prior warnings for safety violations but he was subsequently discharged.

The administrative record reflects that claimant has received unemployment benefits in the amount of $5,460.00, since his separation date, and for the claim year with an effective date of December 17, 2017. The administrative record also establishes that the employer did not participate in the fact-finding interview or make a witness with direct knowledge available for rebuttal. The employer's address of record is its corporate office in Moline, Illinois. The employer receives mail at that address and then manually sends mail to the Waterloo office by US Mail for Ms. DeWinter to complete. Ms. DeWinter denied knowledge of the October 24, 2018 fact-finding interview but did not have information about whether the corporate location received the notice of fact-finding interview. There is not a designated point of contact at the corporate office for purposes of forwarding mail to Ms. DeWinter and no witness from the corporate office participated in the Appeals hearing.

Following the fact-finding interview, an initial unemployment insurance decision (Reference 06) resulting in benefits being awarded was mailed to the employer's last known address of record on October 26, 2018. The decision contained a warning that an appeal must be postmarked or received by the Appeals Bureau by November 5, 2018.

Ms. DeWinter also denied receipt of the initial decision or being forwarded the decision from the corporate office, which is also the address of record for initial decisions. No witness or information from the corporate office participated to establish the mail collecting procedures during this time, whether there was any disruption in mail service or to confirm no initial decision was received and therefore could not have been forwarded to Ms. DeWinter for handling. The claimant then established a claim for benefits with an effective date of December 16, 2018. Upon receipt of the January 4, 2019 initial decision from the corporate office, Ms. DeWinter filed an appeal on January 11, 2018 (Employer Exhibit 1).

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the employer's appeal is untimely.

Iowa Code section 96.6(2) provides, in pertinent part:

> Filing – determination – appeal.
> 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.

Iowa Admin. Code r. 871-24.35(2) provides:

> Date of submission and extension of time for payments and notices.
> (2) 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 division that the delay in submission was due to division error or misinformation or to delay or other action of the United States postal service.
> a. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.
> b. The division shall designate personnel who are to decide whether an extension of time shall be granted.
> c. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the department after considering the circumstances in the case.
> d. If submission is not considered timely, although the interested party contends that the delay was due to division error or misinformation or delay or other action of the United States postal service, the division shall issue an appealable decision to the interested party.

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).

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. Iowa Dep't of Job Serv.*, 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. Iowa Dep't of Job Serv.*, 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. Iowa Emp't Sec. Comm'n*, 217 N.W.2d 255 (Iowa 1974); *Smith v. Iowa Emp't Sec. Comm'n*, 212 N.W.2d 471, 472 (Iowa 1973).

The record shows that the appellant did have a reasonable opportunity to file a timely appeal. The employer chooses to use its Moline, Illinois corporate address for IWD related mail, and then manually forwards mail to Ms. DeWinter in Waterloo for handling. This business decision can cause a delay in replying to time-sensitive mail. While Ms. DeWinter personally may not have received the initial decision dated October 26, 2018, the evidence presented does not support that the corporate office did not receive the initial decision. Given the possible internal disconnect between the corporate office and Ms. DeWinter, and in the absence of any specific information about or from the corporate office regarding mail handling/delegating to Ms. DeWinter, the evidence presented does not support that the employer's delay in filing a timely appeal within the time prescribed by the Iowa Employment Security Law *was due to any Agency error or misinformation or delay or other action of the United States Postal Service* pursuant to Iowa Admin. Code r. 871-24.35(2). The administrative law judge further concludes that the appeal was not timely filed pursuant to Iowa Code § 96.6(2), and the administrative law judge lacks jurisdiction to make a determination with respect to the nature of the appeal. See,

Beardslee v. Iowa Dep't of Job Serv., 276 N.W.2d 373 (Iowa 1979) and *Franklin v. Iowa Dep't of Job Serv.*, 277 N.W.2d 877 (Iowa 1979).

In the alternative, even if the appeal is deemed timely filed, the claimant would remain eligible for benefits, as the claimant was discharged for no disqualifying reason.

Iowa law disqualifies individuals who are discharged from employment for misconduct from receiving unemployment insurance benefits. Iowa Code § 96.5(2)a. They remain disqualified until such time as they requalify for benefits by working and earning insured wages ten times their weekly benefit amount. Id.

Iowa Administrative Code rule 871-24.32(1)a provides:

> "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such 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. On the other hand 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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Dep't of Job Serv., 275 N.W.2d 445, 448 (Iowa 1979).

Failure in job performance due to inability or incapacity is not considered misconduct because the actions were not volitional. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).). The focus is on deliberate, intentional, or culpable acts by the employee. See *Gimbel v. Employment Appeal Board*, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992). The claimant had no prior warnings for similar infractions in the past. The claimant credibly testified he performed the steps necessary to complete maintenance on the hoist, and recalled having to go back and get his impact gun to secure bolts on the hoist in question. The evidence presented does not support the claimant's actions were willful, deliberate or repeatedly negligent after being previously warned.

The question before the administrative law judge in this case is not whether the employer has the right to discharge this employee, but whether the claimant's discharge is disqualifying under the provisions of the Iowa Employment Security Law. While the decision to terminate the claimant may have been a sound decision from a management viewpoint, for the above stated reasons, the administrative law judge concludes that the employer has not sustained its burden of proof in establishing that the claimant's discharge was due to a final or current act of job related misconduct. Accordingly, benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The October 26, 2018, (reference 06) decision is affirmed. The appeal in this case was not timely, and the decision of the representative remains in effect.

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Jennifer L. Beckman
Administrative Law Judge

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Decision Dated and Mailed

jlb/scn