IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

THOMAS J SCHULTE
Claimant

ROQUETTE AMERICA INC
Employer

APPEAL NO. 11A-UI-03333-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 09/26/10
Claimant: Appellant (1)

Iowa Code Section 96.5(7) – Vacation Pay
Iowa Code Section 96.6(2) – Timeliness of Appeal

STATEMENT OF THE CASE:

Thomas Schulte filed an appeal from the March 4, 2011, reference 02, decision that denied benefits for the two-week period ending December 4, 2010 based on an Agency conclusion that he had received vacation pay that was deductible from his benefits. After due notice was issued, a telephone hearing was commenced by telephone conference call on April 7, 2011. Mr. Schulte participated. Patty Steffensmeier represented the employer. Department Exhibits D-1, D-2 and D-3 were received into evidence.

Based on the outcome of the April 7, 2011 hearing, the hearing concluded on April 25, 2011. Mr. Schulte again participated. Hilary Carter represented the employer. Exhibit One was received into evidence. The administrative law judge took official notice of the Agency's administrative record of benefits disbursed to the claimant.

The hearing in this matter was consolidated with the hearing in Appeal Number 11A-UI-03334-JTT.

ISSUE:

Whether there is good cause to treat Mr. Schulte's late appeal as a timely appeal. There is.

Whether Mr. Schulte received vacation pay and/or holiday pay that is deductible from his unemployment insurance benefits. He did. Whether the vacation pay/holiday was deducted for the correct period. It was.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: On March 4, 2011, Iowa Workforce Development mailed a copy of two decisions to Thomas Schulte's last-known address of record. The first decision was the March 4, 2011, reference 02, decision that denied benefits for the two-week period ending December 4, 2010 based on an Agency conclusion that Mr. Schulte had received vacation pay that was deductible from his unemployment insurance benefits. The second decision was the March 4, 2011, reference 03,

decision that Mr. Schulte was overpaid $376.00 in benefits for the week ending November 27, 2010 based on the vacation pay issue. Both decisions were received at Mr. Schulte's address of record in Keokuk in a timely manner, prior to the deadline for appeal. Each decision contained a warning that an appeal must be postmarked or received by the Appeals Section by March 14, 2011. Mr. Schulte was working out of state at the time the decisions arrived. Mr. Schulte's girlfriend was still living at the Keokuk address of record. Mr. Schulte's girlfriend alerted him to the correspondence from Iowa Workforce Development. Mr. Schulte contacted a Workforce Development for assistance in filing an appeal. The Workforce Development representative agreed to see whether she could file an appeal on Mr. Schulte's behalf. *Several days later*, on March 16, 2011, the Workforce Development representative called Mr. Schulte back and told him that she was unable to file an appeal on his behalf and that he would have to complete and submit an appeal. At this point, Mr. Schulte was beyond the March 14, 2011 appeal deadline. On March 16, 2011, Mr. Schulte's girlfriend obtained an appeal form and, with Mr. Schulte's authorization, signed and dated the completed form. March 17, 2011, Mr. Schulte's girlfriend faxed Mr. Schulte's appeal to the Appeals Section. The Appeals Section received the appeal the same day.

Mr. Schulte separated from the employment on September 28, 2010 due to a labor dispute lockout. Mr. Schulte established a claim for unemployment insurance benefits that was effective September 26, 2010 and received benefits. Ms. Schulte's weekly benefit amount was set at $376.00. For the week ending November 20, 2010, Mr. Schulte reported $180.00 in wages and received $290.00 in unemployment insurance benefits. For the week ending November 27, 2010, Mr. Schulte reported zero wages and received $376.00 in benefits. For the week ending December 4, 2010, Mr. Schulte reported vacation pay equal to or greater than $999.00 and received zero benefits.

Mr. Schulte's hourly wage was $22.53. For the week that ended November 14, 2010, Mr. Schulte received eight hours of holiday pay for Veterans' Day (November 11, 2010) in the gross amount of $180.24. The employer disbursed the holiday pay by means of a check issued to Mr. Schulte on November 19, 2010.

In the pay check that the employer issued to Mr. Schulte on December 3, 2010, the employer paid Mr. Schulte for 72 hours of vacation, eight hours of floating holiday, and eight hours of regular holiday pay for the Thanksgiving holiday (November 25, 2010). The gross total disbursement was $1,982.64. On December 22, 2010, in compliance with instructions received from Workforce Development, the employer provided the Agency with a spreadsheet concerning vacation and holiday pay for all affected employees. The employer reported the periods to which it wanted the regular holiday pay and the vacation pay applied when determining Mr. Schulte's eligibility for unemployment insurance benefits. The employer wanted four days or 32 hours of vacation pay ($720.96) applied to the week that ended November 27, 2010, along with the 8 hours of holiday pay ($180.24) for the Thanksgiving holiday. For the week that ended December 4, 2010, the employer wanted the remaining 40 hours of vacation pay ($901.20) applied. The employer did not designate the period to which it wanted the eight hours of floating holiday ($180.24) applied when the employer made its report to Workforce Development on December 22, 2010.

In response to the information provided by the employer, a Workforce Development representative apportioned the vacation pay as requested by the employer. Because the apportioned vacation pay exceeded the weekly unemployment insurance benefit amount by more than $15.00, the Workforce Development representative concluded that Mr. Schulte was not eligible for benefits for the week that ended November 27, 2010 or the week that ended December 4, 2010. Because Workforce Development had disbursed $376.00 in benefits to

Mr. Schulte for the week that ended November 27, 2010, the Workforce Development representative concluded that those benefits constituted an overpayment that Mr. Schulte was required to repay to the Agency.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.6-2 provides:

> 2. Initial determination. A representative designated by the director shall promptly notify all interested parties to the claim of its filing, and the parties have ten days from the date of mailing the notice of the filing of the claim by ordinary mail to the last known address to protest payment of benefits to the claimant. 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. The claimant has the burden of proving that the claimant meets the basic eligibility conditions of section 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to section 96.5, except as provided by this subsection. The claimant has the initial burden to produce evidence showing that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 10, and has the burden of proving that a voluntary quit pursuant to section 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 1, paragraphs “a” through “h”. 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. If an administrative law judge affirms a decision of the representative, or the appeal board affirms a decision of the administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision is finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The ten-day deadline for appeal begins to run on the date Workforce Development mails the decision to the parties. The "decision date" found in the upper right-hand portion of the Agency 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).

An appeal submitted by mail is deemed filed on the date it is mailed as shown by the postmark or in the absence of a postmark the postage meter mark of the envelope in which it was received, or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion. See 871 AC 24.35(1)(a). See also Messina v. IDJS, 341 N.W.2d 52 (Iowa 1983). An appeal submitted by any other means is deemed filed on the date it is received by the Unemployment Insurance Division of Iowa Workforce Development. See 871 IAC 24.35(1)(b).

The evidence in the record establishes 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.

The evidence establishes that a Workforce Development representative significantly contributed to the late filing of the appeal from each decision by first erroneously assuring Mr. Schulte that the representative could file an appeal on Mr. Schulte's behalf and then by waiting until after the appeal deadline had passed to notify Mr. Schulte she could not file the appeal for him. When Agency error, misinformation or delay causes the late filing of the appeal, there is good cause under the law to treat the late appeal as a timely appeal. See 871 IAC 24.35(2). The administrative law judge concludes there is good cause to treat Mr. Schulte's late appeal from each decision as a timely appeal and that the administrative law judge has jurisdiction to consider and rule upon the appeal in both affected cases.

Iowa Code section 96.5-7 provides:

> An individual shall be disqualified for benefits: …
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> 7. Vacation pay.
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> a. When an employer makes a payment or becomes obligated to make a payment to an individual for vacation pay, or for vacation pay allowance, or as pay in lieu of vacation, such payment or amount shall be deemed "wages" as defined in section 96.19, subsection 41, and shall be applied as provided in paragraph "c" hereof.
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> b. When, in connection with a separation or layoff of an individual, the individual's employer makes a payment or payments to the individual, or becomes obligated to make a payment to the individual as, or in the nature of, vacation pay, or vacation pay allowance, or as pay in lieu of vacation, and within ten calendar days after notification of the filing of the individual's claim, designates by notice in writing to the department the period to which the payment shall be allocated; provided, that if such designated period is extended by the employer, the individual may again similarly designate an extended period, by giving notice in writing to the department not later than the beginning of the extension of the period, with the same effect as if the period of extension were included in the original designation. The amount of a payment or obligation to make payment, is deemed "wages" as defined in section 96.19, subsection 41, and shall be applied as provided in paragraph "c" of this subsection 7.
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> c. Of the wages described in paragraph "a" (whether or not the employer has designated the period therein described), or of the wages described in paragraph "b", if the period therein described has been designated by the employer as therein provided, a sum equal to the wages of such individual for a normal workday shall be attributed to, or deemed to be payable to the individual with respect to, the first and each subsequent workday in such period until such amount so paid or owing is exhausted. Any individual receiving or entitled to receive wages as provided herein shall be ineligible for benefits

for any week in which the sums, so designated or attributed to such normal workdays, equal or exceed the individual's weekly benefit amount. If the amount so designated or attributed as wages is less than the weekly benefit amount of such individual, the individual's benefits shall be reduced by such amount.

d. Notwithstanding contrary provisions in paragraphs "a", "b", and "c", if an individual is separated from employment and is scheduled to receive vacation payments during the period of unemployment attributable to the employer and if the employer does not designate the vacation period pursuant to paragraph "b", then payments made by the employer to the individual or an obligation to make a payment by the employer to the individual for vacation pay, vacation pay allowance or pay in lieu of vacation shall not be deemed wages as defined in section 96.19, subsection 41, for any period in excess of one week and such payments or the value of such obligations shall not be deducted for any period in excess of one week from the unemployment benefits the individual is otherwise entitled to receive under this chapter. However, if the employer designates more than one week as the vacation period pursuant to paragraph "b", the vacation pay, vacation pay allowance, or pay in lieu of vacation shall be considered wages and shall be deducted from benefits.

e. If an employer pays or is obligated to pay a bonus to an individual at the same time the employer pays or is obligated to pay vacation pay, a vacation pay allowance, or pay in lieu of vacation, the bonus shall not be deemed wages for purposes of determining benefit eligibility and amount, and the bonus shall not be deducted from unemployment benefits the individual is otherwise entitled to receive under this chapter.

In this case the vacation and holiday pay were disbursed well after the notice of claim was mailed to the employer and after the initial determination of the claimant's eligibility for benefits had been determined by Workforce Development. Thus, a mechanical operation of the statute, with the 10-day deadline measured from the mailing of the notice of claim, will not work. The question is whether the employer made a *timely* designation of the period to which the employer wished to have the vacation pay and holiday pay applied when determining Mr. Schulte's eligibility for benefits. The administrative law judge concludes that the employer made a timely report in response to instructions issued by Workforce Development. Accordingly, the employer's designation of the period to which it wanted the vacation pay and holiday pay applied controls under the statute, regardless of how Mr. Schulte initially reported the vacation pay to Workforce Development. The administrative law judge concludes that the Workforce Development representative appropriately apportioned the vacation pay to the weeks that ended November 27, 2010 and December 4, 2010. Because the apportioned vacation pay exceeded Mr. Schulte's weekly unemployment insurance benefit amount for each of the two weeks, Mr. Schulte was not eligible for benefits for either week.

DECISION:

The claimant's appeal was timely. The Agency representative's March 4, 2011, reference 02, decision is affirmed. The claimant received vacation pay for the weeks that ended November 27, 2010 and December 4, 2010 that exceeded his weekly unemployment insurance benefit amount each week. The claimant was not eligible for benefits for the two-week period ending December 4, 2010.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs