IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

WILLIAM J VANTIGER
Claimant

WAL-MART STORES INC
Employer

APPEAL NO. 08A-UI-00617-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 10/07/07 R: 04
Claimant: Appellant (2)

Iowa Code section 96.6(2) – Timeliness of Appeal
Iowa Code section 96.3(7) – Overpayment
Iowa Code section 96.5(7) – Vacation Pay

STATEMENT OF THE CASE:

William Vantiger filed an appeal from the December 19, 2007, reference 02, decision that he was overpaid $162.00 for the one-week period of October 7-13, 2007. After due notice was issued, a hearing was held by telephone conference call on February 4, 2008. Mr. Vantiger participated. The employer did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Department Exhibits D-1 through D-6 into evidence.

ISSUES:

Whether the claimant's appeal was timely.

Whether there is good cause to deem the claimant's appeal timely.

Whether the claimant was overpaid benefits of $162.00 for the one-week period of October 7-13, 2007.

Whether the claimant received vacation pay and, if so, whether the vacation pay was appropriately deducted from his unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The December 19, 2007, reference 02, decision was mailed to William Vantiger's last known address of record on December 19, 2007. Mr. Vantiger received the decision in a timely fashion, prior to the deadline for appeal. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by December 29, 2007. The decision also indicated that if the deadline for appeal fell on a Saturday, the deadline would be extended to the next working day. December 29, 2007 was a Saturday and the next working day was Monday, December 31, 2007. The decision indicated that Mr. Vantiger had been overpaid

$162.00 for the one-week period of October 7-13, 2007 and indicated this was because Mr. Vantiger had failed to report, or had incorrectly reported, vacation pay from Wal-Mart Stores, Inc. On December 20 or 21, Mr. Vantiger contacted his local Workforce Development Center in response to receiving the overpayment decision. Mr. Vantiger advised a Workforce Development representative, Barb, that he had in fact received no vacation pay. The Workforce Development representative instructed Mr. Vantiger to contact Wal-Mart and have the employer fax information to Iowa Workforce Development indicating that Mr. Vantiger had in fact received no vacation pay. Mr. Vantiger contacted the Wal-Mart personnel manager the same day. The Wal-Mart personnel manager indicated he/she would send the appropriate information to Iowa Workforce Development in Des Moines.

The following week, Mr. Vantiger learned that the employer had not submitted additional information to Iowa Workforce Development. On Wednesday, December 26, Mr. Vantiger contacted the Workforce Development representative. Mr. Vantiger provided the Workforce Development representative with the number for the employer's personnel manager. The Workforce Development representative told Mr. Vantiger that she would contact the employer and have them submit additional information to Workforce Development in Des Moines. The Workforce Development representative instructed Mr. Vantiger to contact her on Friday, December 28, for an update on the representative's contact with the employer. On Friday, December 28, Mr. Vantiger contacted the Workforce Development representative, who told Mr. Vantiger that the matter had been taken care of. Based on the representation from the Workforce Development representative, Mr. Vantiger did not take additional steps to file an appeal prior to the December 31, 2007 deadline.

On January 17, the Workforce Development representative contacted Mr. Vantiger and told him he would need to report to the Workforce Development Center and complete an appeal to be faxed right away. On January 18, Mr. Vantiger went to the local Workforce Development Center. The Workforce Development representative drafted the appeal, which Mr. Vantiger signed. The Workforce Development representative faxed the appeal to the Appeals Section the same day.

Mr. Vantiger had established a claim for benefits that was effective October 7, 2007. For the benefit week that ended October 13, 2007, Mr. Vantiger reported no wages and received $347.00 in benefits. For the benefit week that ended October 20, Mr. Vantiger reported no wages and again received $347.00 in benefits.

Mr. Vantiger had filed the claim for benefits in connection with a period of voluntary time off that began October 8 and ended October 19, 2007. The employer was experiencing a slowing of business and sought employees to volunteer for time off. Mr. Vantiger volunteered to be off. Had Mr. Vantiger not volunteered to take time off, the employer would have made work available for Mr. Vantiger. Mr. Vantiger worked at the employer's distribution center and drove a truck.

On November 13, Iowa Workforce Development sent a notice of claim to the employer's address of record, care of Frick UC Express. The employer's representative received the notice of claim in a timely fashion. The notice of claim bore a November 26, 2007 deadline for the employer's protest. On November 26, the employer's representative drafted a protest. In the protest letter, the employer's representative indicated that Mr. Vantiger had received vacation pay of $161.49 to be applied to the benefit week that ended October 13, 2007. The employer submitted the protest information by mail. Though the protest materials were dated November 26, the envelope was postmarked November 28, 2007.

Mr. Vantiger had received vacation pay, but the vacation pay was for time he had taken on October 5, prior to the effective date of his claim.

REASONING AND CONCLUSIONS OF LAW:

The administrative law judge will first address the timeliness of the claimant's appeal.

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). See also Pepsi-Cola Bottling Company of Cedar Rapids v. Employment Appeal Board, 465 N.W.2d 674 (Iowa App. 1990). 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). In this case, Mr. Vantiger's

appeal was filed on January 18, 2008, the day he delivered the appeal to his local Workforce Development Center.

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 Mr. Vantiger did have a reasonable opportunity to file a timely appeal. However, the evidence indicates that the failure to file a timely appeal was attributable to misinformation Mr. Vantiger received from a Workforce Development representative. See 871 IAC 24.35(2). The evidence indicates that Mr. Vantiger reasonably relied upon the Agency representative's statements that the matter was "taken care of." When the Agency representative contacted Mr. Vantiger on January 17, 2008 to advise that the matter was not in fact taken care of and that Mr. Vantiger needed to file an appeal, Mr. Vantiger promptly submitted an appeal that was filed the following day. The administrative law judge concludes that the claimant has established good cause to deem the late appeal timely. Accordingly, the administrative law judge has jurisdiction to rule on the merits of the appeal.

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.
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> 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.
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> 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.

The greater weight of the evidence indicates that the employer was late in submitting information regarding vacation pay. Accordingly, the information provided by the employer would not determine the period to which any insurance benefits would be applied. Instead, vacation pay, if any, would be applied to the first week of the claim. The greater weight of the evidence indicates that Mr. Vantiger did not in fact receive vacation pay in connection with his October 8-19 time away from the employer. The vacation pay in question was for time taken on October 5, prior to the effective date of the claim for unemployment insurance benefits. Accordingly, there would be no vacation pay to deduct from unemployment insurance benefits.

Iowa Code section 96.3-7 provides:

> 7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.
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> If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The evidence indicates there was not an overpayment of benefits attributable to unreported vacation pay. Accordingly, the December 19, 2007, reference 02, decision is reversed.

However, the evidence in the record presents another issue. Mr. Vantiger indicated through his testimony that the October 8-19, 2007 period for which he received unemployment insurance benefits was not in fact a temporary lay off but was instead a period of voluntary time off without pay. The Administrative file reflects a reference 01 decision entered on December 18, 2007. That decision ruled on Mr. Vantiger's availability under Iowa Code section 96.4(3) and ruled that the claim for benefits was in fact based on a temporary lay off. In light of Mr. Vantiger's testimony at the February 4, 2008 hearing, the reference 01 decision of the claims representative was in error. However, the employer did not appeal the representative's decision and it became a final Agency decision binding the parties. In light of the final Agency decision, no order for remand will enter.

DECISION:

The claimant's appeal was timely. The Agency representative's December 19, 2007, reference 02, decision is reversed. The claimant did not receive vacation pay applicable to the period during which his claim for unemployment insurance was active. The claimant is not overpaid $162.00 for the benefit week that ended October 13, 2007.

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James E. Timberland
Administrative Law Judge

_____
Decision Dated and Mailed

jet/kjw