

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

YEE L THAO
Claimant

APPEAL NO. 13A-UI-08310-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TYSON FRESH MEATS INC
Employer

OC: 06/02/13
Claimant: Appellant (1)

Iowa Code Section 96.5(1) – Voluntary Quit
Iowa Code Section 96.6(2) – Timeliness of Appeal

STATEMENT OF THE CASE:

Yee Thao filed an appeal from the July 2, 2013, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on October 9, 2013. Mr. Thao participated. Will Sager represented the employer. Hmong-English interpreter Doua Lor assisted with the hearing. Exhibit A and Department Exhibit D-1 were received into evidence.

ISSUES:

Whether Mr. Thao's appeal was timely. Whether there is good cause to treat the appeal as timely.

Whether Mr. Thao separated from the employment for a reason that disqualifies him for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant Yee Thao has minimal English speaking skills, does not read English, and is a native Hmong speaker.

Yee Thao was employed by Tyson Fresh Meats, Inc., in Storm Lake as a full-time production worker from March 2011 and last performed work for the employer on May 16, 2013. On May 16, 2013, the plant superintendent suspended Mr. Thao for attendance pending a review of his attendance history and a decision regarding whether he should be discharged from the employment. Mr. Thao had accrued 14 attendance points, which subjected him to possible discharge from the employment. Mr. Thao's final three absences that factored in the suspension occurred on May 9, 10 and 15, 2013. On May 9 and 10, Mr. Thao was absent due to a lack of transportation. Mr. Thao's car was no longer operational. On May 15, Mr. Thao was absent because he lacked a babysitter for his child. Mr. Thao was a single parent and relied upon friends and a babysitter to watch his child while he was at work. However, the babysitter had moved and was no longer available.

When the superintendent suspended Mr. Thao on May 16, he directed Mr. Thao to return for a meeting the next day, Friday, May 17, 2013. When Mr. Thao returned on May 17, the employer asked him whether he enjoyed working for the employer, whether he would be willing to explore a couple suggestions the employer had for childcare, and whether he would be able to secure transportation to the workplace. Mr. Thao told the employer that he enjoyed his job, that he was willing to ride a bike to work, but that he continued to have a lack of childcare. The employer did not give Mr. Thao an answer at that time about whether he would be allowed to continue in the employment. Instead, the employer gave Mr. Thao an opportunity to follow up on childcare options. Mr. Thao made a couple phone calls regarding childcare, but had to leave a voice mail message.

On Monday, May 20, 2013, Mr. Thao notified the employer that he was moving back to St. Paul, Minnesota, where he had family. Mr. Thao thanked the employer for the employment. Mr. Thao did in fact relocate to Fridley, Minnesota in May 2013.

On July 2, 2013, Iowa Workforce Development mailed a copy of the July 2, 2013, reference 01, to Yee Thao's last-known address of record in Fridley, Minnesota. The decision denied benefits. The decision contained a warning that an appeal must be postmarked by July 12, 2013 or received by the Appeals Section by that date. Mr. Thao received the decision on or about July 13, 2013. On July 15, 2013, Mr. Thao took the decision to his cousin and the cousin drafted an appeal letter, which letter Mr. Thao mailed the same day. The letter is dated July 15, 2013. The letter envelope bears a July 15, 2013 postmark.

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).

The appeal in question was filed on July 15, 2013, the postmark date on the envelope in which the appeal was mailed.

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. Thao did not have a reasonable opportunity to file a timely appeal. The weight of the evidence indicates that Mr. Thao received the decision on or about July 13, 2013, after the July 12, 2013 deadline had expired. Mr. Thao filed an appeal the next working day, Monday, July 15, 2013. The evidence establishes good cause to treat the appeal as a timely appeal. The delay in filing the appeal appears to have been attributable to delay or other action of the United States Postal Service. See 871 IAC 24.35(2). The administrative law judge has jurisdiction to rule on the merits of the appeal.

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(2) provides:

Voluntary quit without good cause. 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. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5. However, the claimant has the initial burden to produce evidence

that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:

(2) The claimant moved to a different locality.

In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. See Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 698, 612 (Iowa 1980) and Peck v. EAB, 492 N.W.2d 438 (Iowa App. 1992). 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. See 871 IAC 24.25.

The evidence in the record indicates that the employer was willing to allow Mr. Thao to continue in the employment, provided he secured transportation and childcare so that he could report for work. The weight of the evidence indicates that during the period during which the employer gave Mr. Thao an opportunity to arrange childcare, Mr. Thao reported back instead that he was leaving the employment to relocate to Minnesota. Mr. Thao voluntarily quit the employment without good cause attributable to the employer. Accordingly, Mr. Thao is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account shall not be charged for benefits paid to Mr. Thao.

Even if the administrative law judge had concluded that Mr. Thao was discharged and did not voluntarily quit, the end result would have been a disqualification for benefits. This is because Mr. Thao's final three absences, on May 9, 10 and 15, 2013, were each unexcused absences under the applicable laws and they constituted excessive unexcused absences. The excessive unexcused absences constituted misconduct in connection with the employment that would disqualify Mr. Thao for unemployment insurance benefits. See Iowa Code section 96.5(2)(a) and Iowa Admin. Code section 871 IAC 24.32(7).

DECISION:

The claimant's appeal was timely. The Agency representatives July 2, 2013, reference 01, decision is affirmed. The claimant voluntarily quit the employment without good cause attributable to the employer. The claimant is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account shall not be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css