IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

TRAVIS J BARKER
Claimant

DANIEL ROYER
Employer

APPEAL NO. 11A-UI-09511-VST

ADMINISTRATIVE LAW JUDGE DECISION

OC: 06/05/11
Claimant: Respondent (2R)

Section 96.5-2-A – Discharge for Misconduct
Section 96.3-7 – Overpayment of Benefits
Section 96.6-2 – Timeliness of Appeal

STATEMENT OF THE CASE:

Employer filed an appeal from a decision of a representative dated June 29, 2011, reference 01, which held claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on August 10, 2011. Employer participated by Daniel Royer, Owner. Teresa Royer and B J Charleson were witnesses for the employer. Claimant failed to respond to the hearing notice and did not participate. The record consists of the testimony of Teresa Royer; the testimony of Daniel Royer; and the testimony of B J Charleson. Official notice is taken of agency records.

ISSUES:

Whether the employer filed a timely appeal;

Whether the claimant was discharged for misconduct; and

Whether the claimant has been overpaid unemployment insurance benefits.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

On June 29, 2011, a representative issued a decision that held that the claimant was ineligible for unemployment insurance benefits. The decision also states that the decision would become final unless an appeal was postmarked by July 9, 2011, or received by the Appeals Section on that date. The employer went to the Carroll, Iowa, Workforce Center and filed an appeal on July 7, 2011. The fax from the Carroll, Iowa Workforce Center was not received by the Appeals Section. The Carroll, Iowa, Workforce Center then re-faxed the employer's appeal on July 21, 2011.

The employer power washes hog sheds. The claimant was initially hired in 2009. The claimant had persistence attendance problems, which led to warnings from the employer on October 6, 2009, and December 21, 2009. The claimant was absent 30 days out of 21 weeks of employment. The claimant was terminated for attendance on December 22, 2009.

The claimant's grandmother appealed to the employer to re-hire her grandson. The claimant was re-hired in January 2010 and terminated on April 25, 2011, for excessive unexcused absenteeism. The claimant was given a third chance and re-hired on May 9, 2011. He left early on May 13, 2011; was tardy on May 16, 2011; was a no-call/no-show on May 25, 2011; was tardy on May 27, 2011; and a no-call/no-show on June 2, 2011. The claimant was terminated on June 3, 2011, for excessive unexcused absenteeism.

REASONING AND CONCLUSIONS OF LAW:
The preliminary issue in this case is whether the employer timely appealed the representative's decision. Iowa Code section 96.6-2 provides that unless the affected party (here, the employer) files an appeal from the decision within ten calendar days, the decision is final and benefits shall be paid or denied as set out by 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 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 an appeal postmarked as timely.

The administrative law judge concludes that failure have the appeal timely postmarked within the time prescribed by the Iowa Employment Security Law was due to agency error as the employer's fax was sent on July 7, 2011, from the Carroll, Iowa Workforce Center. Local Workforce Centers are considered agents of the Appeals Section and therefore the employer filed a timely appeal by filing with a local Workforce Center. For some reason the fax was not received by the Appeals Section on July 7, 2011, which will deemed agency error. The employer's appeal is accepted as timely.

Iowa Code section 96.5-2-a provides:

> An individual shall be disqualified for benefits:
>
> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
>
> a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

871 IAC 24.32(1)a provides:

> Discharge for misconduct.
>
> (1) Definition.
>
> a. "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.

Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. Excessive unexcused absenteeism is one form of misconduct. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). The concept includes tardiness and leaving early. The employer has the burden of proof to show misconduct.

The uncontroverted evidence in this case is that the claimant was terminated for excessive unexcused absenteeism. The employer had previously terminated the claimant for attendance and gave the claimant a third chance at employment on May 9, 2011. Between May 9, 2011, and June 3, 2011, the claimant had five instances of absenteeism. Only the first absence could be construed as excused as the claimant did ask to leave early so that he could babysit. The final four absences were unexcused. The final absence was a no-call/no-show. The claimant knew that his employer expected good attendance and since he had been terminated in the

past for excessive absenteeism, the claimant knew his job would be in jeopardy if he failed to show up for work. Misconduct has been established. Benefits are denied.

The next issue is overpayment of benefits.

Iowa Code section 96.3-7, as amended in 2008, provides:

> 7. Recovery of overpayment of benefits.
>
> a. 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.
>
> b. (1) 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. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.
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> (2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

The overpayment issue is remanded to the Claims Section for determination.

DECISION:

The decision of the representative dated June 29, 2011, reference 01, is reversed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible. The overpayment issue is remanded to the Claims Section for determination.

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Vicki L. Seeck
Administrative Law Judge

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Decision Dated and Mailed

vls/css