IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

DEREK S RICE
Claimant

JELD-WEN INC
Employer

APPEAL NO. 11A-UI-07554-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 02/13/11
Claimant: Appellant (1)

Section 96.5-2-a – Discharge
Section 96.6-2 – Timeliness of Appeal

STATEMENT OF THE CASE:

Derek S. Rice (claimant) appealed a representative's March 16, 2011 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment from Jeld-Wen, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on July 7, 2011. The claimant participated in the hearing. Tom Kuiper of TALX Employer Services appeared on the employer's behalf and presented testimony from one witness, Chris Juni. During the hearing, Exhibit A-1 was entered into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Was the claimant's appeal timely or are there legal grounds under which it should be treated as timely?

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The representative's decision was mailed to the claimant's last known address of record on March 16, 2011. The claimant may have received the decision. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by March 26, 2011, a Saturday. The notice also provided that if the appeal date fell on a Saturday, Sunday, or legal holiday, the appeal period was extended to the next working day, which in this case was Monday, March 28. The appeal was not filed until it was completed and turned in at a local Agency office on June 8, 2011, which is after the date noticed on the disqualification decision.

The claimant was uncertain as to whether he had received the decision in part because of not having good recollection of the situation at the end of March, but not substantially because he has a form of a learning disability resulting in difficulty reading; he has approximately a third grade reading level ability. He simply assumed he had been denied unemployment insurance

benefits because, after several weeks, he had not received benefits. He did not understand he could appeal a denial until approximately June, when he made his appeal.

The claimant started working for the employer on July 12, 2010. He worked full-time as a laborer in a first-shift position at the employer's Grinnell, Iowa, door manufacturing facility. His last day of work was February 8, 2011. The employer discharged him on February 10, 2011. The reason asserted for the discharge was excessive absenteeism.

The employer has an eight-point attendance policy, of which the claimant was on notice. From July 12, 2010 through January 3, 2011, the claimant had the following attendance occurrences:

Date	Occurrence/reason if any	Points assessed, cum. total
07/15/10	Late, transportation issues.	.5 pt, .5 pt.
07/19/10	Absent, personal.	1 pt., 1.5 pts.
08/30/10	Late, transportation issues.	.5 pt, 2.0 pts.
09/01/10	Late more than 4 hours, car problems.	1 pt., 3.0 pts.
10/07/10	Late, transportation issues.	.5 pt., 3.5 pts.
10/18/10	No-call, no-show, personal.	2 pts., 5.5 pts.
11/05/10	Absent, personal.	1 pt., 6.5 pts.
12/09/10	Late, transportation issues.	.5 pt, 7.0 pts.
12/28/10	Late, transportation issues.	.5 pt., 7.5 pts.
01/03/11	Late, transportation issues.	.5 pt., 8.0 pts.

The employer had not yet given the claimant a final attendance warning, so after the January 3, 2011 occurrence the employer gave the claimant a final warning, advising him that he could miss no more time until July 2011 or he would be discharged.

On February 9, 2011, the claimant called in an absence for a personal reason. As a result, when he sought to return to work on February 10, he was informed he was being discharged due to his attendance.

REASONING AND CONCLUSIONS OF LAW:

The preliminary issue in this case is whether the claimant timely appealed the representative's decision. Iowa Code § 96.6-2 provides that unless the affected party (here, the claimant) 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 not have a reasonable opportunity to file a timely appeal.

While the administrative law judge believes it is likely that the claimant did receive the representative's decision in March, having a reading disability does provide some basis for concluding the claimant was not able to read and understand the decision. While the administrative law judge is not overly impressed by the claimant's lack of taking responsibility to ensure he knew what was going on with his claim by obtaining assistance until June, under the circumstances of this case I conclude that failure to file a timely appeal within the time prescribed by the Iowa Employment Security Law was due to a factor outside of the claimant's control. 871 IAC 24.35(2). The administrative law judge further concludes that the appeal should be treated as timely filed pursuant to Iowa Code § 96.6-2. Therefore, the administrative law judge has jurisdiction to make a determination with respect to the nature of the appeal. See, Beardslee, supra; Franklin, supra; and Pepsi-Cola Bottling Company v. Employment Appeal Board, 465 N.W.2d 674 (Iowa App. 1990).

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982); Iowa Code § 96.5-2-a.

In order to establish misconduct such as to disqualify a former employee from benefits, an employer must establish the employee was responsible for a deliberate act or omission that was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445 (Iowa 1979); Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior that 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. 871 IAC 24.32(1)a; Huntoon, supra; Henry, supra. In contrast, 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. 871 IAC 24.32(1)a; Huntoon, supra; Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

Absenteeism can constitute misconduct; however, to be misconduct, absences must be both excessive and unexcused. 871 IAC 24.32(7). Assessing the credibility of the witnesses and the reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has satisfied its burden to establish by a preponderance of the evidence that the claimant had a further absence on February 9, 2011. While the claimant

denied being absent that day, his claimant's recollection of that time frame was fuzzy at best; the employer's records, made at the time of the occurrence, indicate that there was an absence, and under the circumstance of this case are more credible.

Absences and tardies due to issues that are of purely personal responsibility are not excusable. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984); Harlan v. Iowa Department of Job Service, 350 N.W.2d 192 (Iowa 1984). This specifically includes issues such as car problems or other transportation issues. The claimant's final absence was not shown to be excused or due to illness or other reasonable grounds. The claimant had previously been warned that future absences could result in termination. Higgins, supra. His prior absences and tardies were excessive and unexcused. The employer discharged the claimant for reasons amounting to work-connected misconduct.

DECISION:

The appeal in this case is treated as timely. The representative's March 16, 2011 decision (reference 01) is affirmed. The employer discharged the claimant for disqualifying reasons. The claimant is disqualified from receiving unemployment insurance benefits as of February 10, 2011. This disqualification continues until he has been paid ten times his weekly benefit amount for insured work, provided he is otherwise eligible. The employer's account will not be charged.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

ld/kjw