IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

KEVIN D ELLIS
Claimant

SENIOR HOUSING HEALTH CARE INC
Employer

APPEAL NO. 15A-UI-09791-JT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 03/29/15
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Kevin Ellis filed an appeal from the June 5, 2015, reference 03, decision that disqualified him for benefits and that relieved the employer's account of liability for benefits; based on an Agency conclusion that Mr. Ellis had voluntarily quit on May 5, 2015 without good cause attributable to the employer. Mr. Ellis requested an in-person hearing. After due notice was issued, an in-person hearing was held at the Cedar Rapids Workforce Development Center on December 8, 2015. Mr. Ellis participated. The employer did not participate in the hearing. The hearing in this matter was consolidated with the hearing in Appeal Number 15A-UI-10788-JT. Department Exhibits D-1 through D-5 were received into evidence.

Despite being located in Cedar Rapids and despite receiving timely notice of the in-person hearing, the employer elected not to appear in-person for the in-person hearing. The law required that the administrative law judge honor the claimant's request for an in-person hearing. See Iowa Administrative Code Section 871-26.6(4). The further provides as follows: "In the discretion of the presiding officer to whom the contested case is assigned, witnesses or representatives may be allowed to participate via telephone in an in-person hearing, provided that each party has at least one witness present at the hearing site." Id. Prior to the time of the hearing, neither the employer nor any employer representative had requested to have the representative or witnesses participate by telephone for the in-person hearing. At the time of the hearing, the administrative law judge noted on the Clear2There hearing control screen that the employer or an employer representative had registered phone numbers that very morning for the in-person hearing. The notice for the in-person hearing had set forth the time, date, and location of the in-person hearing. The notice had also contained the following additional instructions: "When you appear for the hearing at the time and place specified above, **you should ask immediately where to go for the hearing. Do no wait in line.** You must be prepared to present your case at the time specified in this notice." The hearing notice contained no instruction or authorization to register a telephone number for the in-person hearing. At the time of the hearing, the administrative law judge telephoned Merit Resources representative Brittany Schuett at the number she had provided for the hearing. Ms. Schuett indicated that she had registered a number for the hearing just because she knew how to register a number for telephone hearing and the Clear2There system had not prevented her from doing so. Despite receiving additional time to produce a witness for the in-person hearing to comply with the

administrative rule, neither Ms. Schuett nor the employer appeared for the hearing. In addition, Ms. Schuett advised that the witness whose number she had registered on Clear2There was not even available by telephone for the hearing. The claimant stated clearly that he had requested an in-person hearing so that he could confront the employer regarding the circumstances of his hire and separation. The claimant objected to the employer participating by telephone in the in-person hearing. The claimant objected to Ms. Schuett participating by telephone in light of the fact that no employer witness was present in-person. The administrative law judge sustained the claimant's objections, based on the employer's failure to comply with the hearing notice and the law.

ISSUES:

Whether there is good cause to treat Mr. Ellis' late appeal as a timely appeal.

Whether Mr. Ellis' voluntary quit was for good cause attributable to the employer.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: On June 5, 2015, Iowa Workforce Development mailed a copy of the June 5, 2015, reference 03, decision to Kevin Ellis at his last-known address of record. The decision disqualified Mr. Ellis for benefits, based on an Agency conclusion that Mr. Ellis had voluntarily quit employment with Senior Housing Health Care, Inc. on May 5, 2015 without good cause attributable to the employer. The decision contained a warning that an appeal from the decision must be postmarked by June 15, 2015 or received by the Appeals Section by that date. Mr. Ellis did not receive the decision that was mailed to him on June 5, 2015. Mr. Ellis had been experiencing difficulty in receiving mail and attributed this to a change in his postal carrier.

On August 29, 2015, Mr. Ellis accessed the Workforce Development website and filed an online appeal.

Mr. Ellis commenced his full-time employment with Senior Housing Health Care, Inc. on April 28, 2015 and voluntarily quit the employment on May 5, 2015; after concluding that the nature of the employment had been misrepresented at the time of hire. In the course of performing delivery duties for a prior employer, Mr. Ellis had established a business relationship with Lee Thoma, Director of Nursing at Senior Housing Health Care. When the prior employer laid Mr. Ellis off, Mr. Thoma began to discuss with Mr. Ellis the possibility of Mr. Ellis coming to work for Senior Housing Health Care as a "universal worker." Mr. Ellis was reluctant to accept a position at Senior Housing Health Care because he did not want to perform direct care of nursing home residents. Mr. Ellis specifically did not want to assist residents with toileting or other personal hygiene. Mr. Thoma assured Mr. Ellis that the employer's clients were essentially independent. Mr. Thoma assured Mr. Ellis that he would at worst be asked to provide a self-bathing resident with a washcloth upon request. Once Mr. Ellis accepted and began the employment, he spent the first few days reviewing training videos that emphasized maintaining a positive attitude when interacting with residents and their families. On his first day of shadowing another employee, Mr. Ellis learned that the position he had accepted involved direct assistance of residents with their personal hygiene, including toileting and bathing residents. On that first day of job shadowing, Mr. Ellis told his trainer that the actual duties were not what had been represented to him. On the next day, Mr. Ellis notified Mr. Thoma that he was quitting the employment.

Mr. Ellis established an original claim for benefits that was effective March 29, 2015. Mr. Ellis' base period, for purposes of the claim year that began on March 29, 2015 and that will end on March 26, 2016, consists of the fourth quarter of 2013 and the first second and third quarters of the 2014. The brief employment with Senior Housing Health Care, Inc. did not fall within the base period and that employer's account has not been charged for benefits paid to Mr. Ellis in connection with the claim.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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).

Mr. Ellis' appeal was filed on August 29, 2015; when the Appeals Section received the online appeal. Mr. Ellis filed his appeal soon after speaking to a Workforce Development representative and learning that a decision had been entered that disqualified him for benefits based on his separation from Senior Housing Health Care. Mr. Ellis did not actually see a copy of the decision until the December 8, 2015 appeal hearing.

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. Ellis did not have a reasonable opportunity to file an appeal by the June 15, 2015 deadline because he did not receive the decision. At the time that Mr. Ellis filed his appeal on August 29, 2015, he had still not received a copy of the decision. The late filing of the appeal was most likely attributable to the United States Postal Service not delivering the appeal to the correct address. Accordingly, there is good cause to treat Mr. Ellis' late appeal as a timely appeal. See 871 IAC 24.35(2). The administrative law judge has jurisdiction to make a determination with respect to the nature of the appeal. See, Beardslee v. IDJS, 276 N.W.2d 373 (Iowa 1979) and Franklin v. IDJS, 277 N.W.2d 877 (Iowa 1979).

Iowa Code § 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.

Iowa Admin. Code r. 871-24.26(23) provides:

> Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:
>
> (23) The claimant left work because the type of work was misrepresented to such claimant at the time of acceptance of the work assignment.

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 established a voluntary quit for good cause attributable to the employer. The employer misrepresented the nature of the employment at the time Mr. Ellis accepted the employment. Mr. Ellis did promptly quit the employment once he determined that the duties substantially differed from the employer's representations at the time of hire. Mr. Ellis is eligible for benefits, provided he is otherwise eligible.

Because Senior Housing Health Care, Inc. is not a base-period employer for purposes of the claim year that began for Mr. Ellis on March 29, 2015 and that will end on March 26, 2015, that employer's account has not and will not be charged for benefits paid to Mr. Ellis in connection with that current claim year. However, the employer's account may be charged for benefits in connection with a subsequent benefit year if Mr. Ellis meets all eligibility requirements and if the employer is deemed a base-period employer in connection with the future claim year.

DECISION:

The June 5, 2015, reference 03, decision is reversed. The claimant's appeal was timely. The claimant voluntarily quit on May 5, 2015 for good cause attributable to the employer. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to the claimant as outlined above.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

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