IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

DANIEL E DEE
Claimant

MILLENNIUM CONCRETE LLC
Employer

APPEAL NO: 13A-UI-03713-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 01/03/10
Claimant: Respondent (5)

871 IAC 24.1(113)a – Layoff
Section 96.5-3-a – Work Refusal
Section 96.6-2 – Timeliness of Appeal

STATEMENT OF THE CASE:

Millennium Concrete, L.L.C. (employer) appealed a representative's February 15, 2013 decision (reference 01) that concluded Daniel E. Dee (claimant) was qualified to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on March 31, 2013. This appeal was consolidated for hearing with one related appeal, 13A-UI-05008-DT. The claimant participated in the hearing. Josh Covert appeared on the employer's behalf. 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 employer's appeal timely or are there legal grounds under which it should be treated as timely?

Was there a disqualifying separation from employment either through a voluntary quit without good cause attributable to the employer or through a discharge for misconduct?

Is the claimant disqualified due to refusing an offer of suitable work?

FINDINGS OF FACT:

The representative's decision was mailed to the employer address in North Liberty, Iowa on February 15, 2013. The employer did not receive that decision. The employer received the subsequent decision issued on March 14, 2013, but not until about March 28, 2013. The February decision contained a warning that an appeal must be postmarked or received by the Appeals Section by February 25, 2013, a Monday. The March decision contained a warning that an appeal must be postmarked or received by the Appeals Section by March 24, 2013, a Sunday. 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 26. The appeal was not filed until it was faxed to the Appeals Section and received on March 28, 2013, which is after the date noticed on the disqualification decision.

The employer's business address previously had been in North Liberty, but the business had moved by the first of 2012. The employer had updated its mailing address with the Agency to its new address in Coralville, Iowa, and throughout 2012 had been receiving official mailings from the Agency sent to the correct address in Coralville. It is unknown why some Agency mail began to be resent in 2013 to the employer's prior address in North Liberty. The employer made its appeal from the March 14 decision as soon as it received the decision.

The claimant worked as a concrete finisher through his union hall. He most recently started working for the employer on October 1, 2012[1]. He worked full time first at the employer's Des Moines, Iowa business site, through October 5, and then at the employer's Iowa City business site, through October 13.

The Iowa City work had been arranged while the claimant was working on the Des Moines job. He was approached by one of the employer's owners and asked if he would be willing to come and work the next week on the parking lot project the employer was doing in Iowa City. The claimant agreed, and reported to work in Iowa City the next week. On about Wednesday, October 10, the claimant observed to the owner that the work on the parking lot was nearly finished, and he asked whether the employer would need the claimant to work on any other aspects of the overall project. At that time the owner indicated that they would probably hold off on the additional work and would not need the claimant. On Friday, October 12, the claimant again spoke with the owner; the owner confirmed that the claimant's work was done, and told him that he was laid off.

Later on October 12 the claimant arranged to meet with Covert, the chief financial officer, at a local bank to receive his paycheck for his first week's work. He advised Covert that one of the owners had told him he was laid off, and asked Covert to check with the owner, as if he was laid off, it seemed logical to also receive his paycheck for his second week's work. Covert did so, and confirmed that the owner had said that currently there was no further work available for the claimant, so Covert issued the claimant his other paycheck. Covert asserts that he suggested to the claimant that he recontact the owners on Sunday, October 14, to see if anything had changed; the claimant denies that this was said to him.

Covert provided second hand testimony that there was a further conversation between the claimant and one of the owners on October 14; he asserted that in that conversation the owner did offer the claimant additional work on the Iowa City worksite, but that the claimant declined the work because of the distance from his home in Des Moines, even though the employer allegedly was offering to provide housing in Iowa City. The claimant denied that any such conversation occurred; he maintains that the last conversation he had with anyone on behalf of the employer was the conversation at the bank with Covert on October 12.

[1] While the parties generally agreed the employment was for a two week period, there was some disagreement as to exactly which two weeks were involved. The administrative law judge takes official notice of the fact that as the claimant had an active claim for unemployment insurance benefits at the time, he reported receiving wages for the benefit weeks ending October 6, 2012 and October 13, 2012, and not weeks either immediately prior to or after this two-week period.

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 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 not have a reasonable opportunity to file a timely appeal.

The administrative law judge concludes that failure to file a timely appeal within the time prescribed by the Iowa Employment Security Law was due to Agency error or misinformation, or other factor outside of the employer's control. 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 separation is disqualifying if it is a voluntary quit without good cause attributable to the employer or if it is a discharge for work-connected misconduct.

871 IAC 24.1(113)a provides:

> Separations. All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations.
>
> a. Layoffs. A layoff is a suspension from pay status (lasting or expected to last more than seven consecutive calendar days without pay) initiated by the employer without prejudice to the worker for such reasons as: lack of orders, model changeover, termination of seasonal or temporary employment, inventory-taking, introduction of laborsaving devices, plant breakdown, shortage of materials; including temporarily furloughed employees and employees placed on unpaid vacations.

Rule 871 IAC 24.25 provides that, 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. A voluntary leaving of employment requires an intention to terminate the employment relationship and an action to carry out that intent. *Bartelt v. Employment Appeal Board*, 494 N.W.2d 684 (Iowa 1993); *Wills v. Employment Appeal Board*, 447 N.W.2d 137, 138 (Iowa 1989). The employer asserted that the claimant was not discharged but that he quit by declining additional work on October 14, 2012. The administrative law judge concludes that the employer has failed to satisfy its burden that the claimant voluntarily quit. Iowa Code §96.6-2. Assessing the credibility of the witnesses and 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 not satisfied its burden to establish by a preponderance of the evidence that the claimant voluntarily quit; rather, he was told multiple times on October 12 that he was laid off. The separation between the claimant and the employer was a layoff by the employer on October 12 due to the lack of work; the employer had no work it could provide to the claimant. There was no disqualifying separation.

The remaining issue in this case is whether the claimant refused a suitable offer of work. Iowa Code § 96.5-3 provides that a claimant will be disqualified for benefits if he has failed without good cause to accept suitable work when offered. However, applying this statute, 871 IAC 24.24(1)a provides that in order for there to be a disqualification for a refusal of work, there must have been a bona fide offer of work to the claimant by personal contact and a definite refusal was made by the claimant. Whether or not Covert made a suggestion to the claimant on October 12 that he should check for possible work on October 14 does not constitute an offer of work and would not have created an obligation on the claimant to check back for more work; after the layoff occurred, it was the employer's obligation to affirmative make any further contact to offer additional work. The employer relies exclusively on the second-hand account from one of the owners to assert that there was an offer of additional work made on October 14, 2012 and that the claimant refused the offer. However, without that information being provided first-hand, the administrative law judge is unable to ascertain whether the employer's owner might have been mistaken or misremembered, whether he is credible, or whether the employer's second hand witness might have misinterpreted or misunderstood aspects of the owner's report. Assessing the credibility of the witnesses and 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 not satisfied its burden to establish by a preponderance of the evidence that the employer made a bona fide offer of work or that the claimant refused the work.

Benefits are allowed, if the claimant is otherwise eligible.

DECISION:

The representative's February 15, 2013 decision (reference 01) is modified with no effect on the parties. The claimant was laid off from the employer as of October 12, 2012 due to a lack of work. The claimant did not refuse a suitable offer of work. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

ld/pjs