IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

BRANDON J HASLEY Claimant **VERMEER MANUFACTURING CO INC** Employer	**APPEAL 21A-UI-10031-ML-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 07/05/20** **Claimant: Appellant (1)**

Iowa Code § 96.6(2) – Timeliness of Appeal
Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

On April 9, 2021, the claimant, Brandon Hasley, filed an appeal from the March 19, 2021, (reference 01) unemployment insurance decision that denied benefits based upon a determination that claimant was discharged for excessive unexcused absenteeism. The parties were properly notified of the hearing. A telephone hearing was held on June 29, 2021. The claimant participated personally. The employer was represented by Erika Bauer and participated through Jill Anderson. Department's Exhibit D-1 was received. Employer's Exhibits 1 through 9 were offered and received into the evidentiary record.

ISSUES:

Is the claimant's appeal timely?
Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: An unemployment insurance decision was mailed to the claimant's correct address on March 19, 2021. Claimant testified that he did not receive the March 19, 2021, decision in the mail. Without prompting, Claimant continued, "The issue there was that mail was not certified and when mail is not certified it is very difficult to receive mail […] so no, I did not receive a physical copy of that." He would later testify, "My understanding is the best way to get something received is to certify it. […] This mail was uncertified so I was unable to sign for it." Claimant did not explain how he came to find out IWD decisions are not sent via certified mail. Outside of explaining it is easier to prove someone received a piece of mail if it is sent via certified mail, claimant did not elaborate on how or why it is difficult for him to receive non-certified mail. This is particularly troubling when considering claimant confirmed that he does receive non-certified mail.

Claimant testified that he has experienced issues with receiving mail in the past dating back to 2009 when he bought a duplex and turned it into a single house. Claimant has since moved

from the duplex; however, he testified his issues with receiving mail followed him to his new address. Claimant did not elaborate on what the issues were or explain how the issues would have followed him to a new address. When asked if he had ever attempted to resolve said issues with the postal service, claimant testified that he talks to his delivery driver about the issues almost every other day. At the very least, this testimony indicates the postal service regularly presents to claimant's mailbox/address. Claimant also provided he is not the only individual in his house that handles the mail. Claimant testified there are approximately five other individuals in the home that could come into contact with the mail.

When asked if he had seen a hard copy of the March 19, 2021, decision, claimant was non-committal. He testified, "Yes, I have seen it, but it was not – I believe the copy that I have came through e-mail I believe, if I even have a copy. I'd have to go through my e-mail and check." Claimant believes he first became aware of the March 19, 2021, decision when he called into Iowa Workforce Development and asked for a status update on his case. Claimant was unsure as to when this communication occurred. Claimant was also unsure as to how he filed an appeal in this matter. Initially, claimant believed he filed his appeal over the phone with a representative from IWD; however, claimant would later testify to filling out an appeal application online.

According to his online appeal application, claimant received the decision on or about April 1, 2021. At hearing, claimant could not confirm or deny receiving the decision on April 1, 2021. Claimant testified it's possible he learned of the decision on April 1, 2021, but this would only be because he was calling IWD on a daily basis. While still possible, it seems unlikely that someone who was calling IWD on a daily basis to inquire about his benefit status would not know of the March 19, 2019, decision until April 1, 2021. Nevertheless, claimant filed his appeal on April 9, 2021.

I do not find claimant's explanation, or lack thereof, to be convincing or credible. As will be discussed herein, the evidentiary record is replete with examples of claimant's dishonesty.

Claimant was employed full-time as a Quality Technician for the employer. Claimant was hired on May 6, 2019, and last worked for the employer on January 22, 2021, when he was discharged for unexcused absenteeism. The unexcused absences stem from various days in which he requested, but was denied, intermittent FMLA leave. The FMLA leave was denied because claimant failed to timely seek recertification. Claimant initially reported that he was never notified of the need to submit recertification paperwork; however, at hearing, claimant confirmed that he received the notification via e-mail on December 24, 2020. Claimant believes he first read the e-mail on January 12, 2021.

In September, 2020, claimant and his doctor completed Family Medical Leave Act (FMLA) paperwork for him to take intermittent leave for mental health issues. Claimant was approved to utilize four (4) absences per month.

Throughout the month of December 2020, claimant requested FMLA leave for six (6) days. Under Lincoln Financial Group (LFG)'s policy, if an employee exceeds the estimated certified frequency of their leave, LFG can request recertification to see if the additional leaves are reasonable, and whether the monthly allotment of absences needs to be increased.

In a letter, dated December 24, 2020, LFG notified claimant that he had exceeded the estimated certified frequency for his leave under the Family & Medical Leave Act (FMLA) as indicated on his then current Certification form. As a result, claimant was required to submit an updated Certification of Health Care Provider form to confirm that the increased frequency is reasonable and consistent with his intermittent absences. The letter warned that if claimant failed to return the Certification of Health Care Provider form within 15 days, his leave file would be closed. The letter was e-mailed to claimant's personal e-mail account as this was what claimant had marked as his preferred method of communication.

Claimant did not submit a completed Certification of Health Care Provider form within 15 days.

Claimant subsequently requested FMLA leave for January 8, 2021; January 11, 2021; and January 12, 2021. The dates were not approved by LFG because claimant failed to timely submit his recertification paperwork. Claimant contacted LFG to discuss the same on January 13, 2021. The LFG representative told claimant a letter was e-mailed to him on December 24, 2020, notifying him of his need to recertify. The letter was e-mailed to claimant because claimant had selected e-mail as his preferred method of communication during his initial in-take call. In response, Claimant told the LFG representative that he never signed for the letter. The LFG representative reiterated that the letter was e-mailed, not mailed, to claimant. Again, claimant asked the LFG representative if the letter was sent to him via certified mail, and if it shows that he signed for it. The LFG representative told claimant that LFG does not send certified mail, to which claimant said that they should as the capability to send letters via certified mail has been around since 1995. In the same conversation, claimant confirmed that he had received the e-mailed letter notifying him that his leave file had been closed. Claimant then asked the LFG representative why no one called him regarding the December 24, 2020, e-mail, and reported that he had been having issues with his e-mail account. The LFG representative explained that it is not a practice of LFG to call claimants to ensure receipt of documents as such a task would be too time-consuming. LFG then offered to change claimant's contact preference to from e-mail to mail, however, claimant declined. Claimant subsequently began quoting the United States Constitution and asserting his employer and LFG are monopolies engaging in illegal activities. Upon request, Claimant was later transferred to the LFG representative's manager, who was out of the office. The LFG representative described claimant's behavior as rude and aggressive.

The LFG manager returned claimant's call on January 14, 2021. After reiterating all of the information provided by the initial LFG representative, the manager told claimant that his recertification would be reviewed and potentially backdated if claimant's physician indicated that his or her office was closed from December 24, 2020, through January 4, 2021, and that the delay in having the recertification forms completed was their fault.

Per claimant's request, a recording of his initial in-take call was pulled from LFG's records. The September 23, 2020 call indicated that claimant originally asked if all communications could be mailed to him. When LFG told him yes, but it could take 7-10 business days, claimant elected to have all communications sent via e-mail. He proceeded to provide LFG with his personal e-mail address. The contents of the call were relayed to claimant on January 20, 2021. Claimant asked LFG to review the call to see if he asked that communications be sent via certified mail. LFG notified claimant that he did not request the same, and claimant demanded a copy of the recording.

At hearing, claimant was adamant that he only requested that LFG contact him via direct communication, whether that be over-the-phone or in-person. Further, on cross-examination,

claimant testified that LFG actually agreed to claimant's request for verbal communications. Based on the evidentiary record, claimant's testimony in this regard is objectively false.

Claimant submitted the Certification of Health Care Provider forms on January 15, 2021. The recertification forms did not provide that claimant's physician was unavailable between December 24, 2020, and January 4, 2021, so LFG opened a new leave file as opposed to backdating to the old leave file. This decision, and LFG's reasoning for doing so, was relayed to claimant on January 20, 2021. Claimant became upset upon hearing this information.

The LFG manager contacted claimant on January 21, 2021. Despite already knowing the answers to his questions from speaking to a different LFG representative the day prior, claimant asked about the contents of his initial in-take recording, and why LFG created a new leave file as opposed to reopening his old file. When claimant was reminded that a new leave file was created because the certification forms did not indicate his doctor was unavailable between December 24, 2020, and January 4, 2021, claimant asserted that LFG must not have received all of the paperwork his doctor's office sent over. Claimant made this assertion knowing full well he had previously acknowledged that the forms did not provide this information in his January 20, 2021, discussion with an LFG representative. Claimant then asserted that LFG was lying and that they had tampered with his documentation. He further asserted that a nurse from his doctor's office had been trying to reach LFG to sort everything out, but LFG was not answering its phones.

The nurse from claimant's doctor's office contacted LFG on January 21, 2021. According to the nurse, claimant had called into her office and asked them to complete FMLA paperwork. The nurse further relayed that claimant told her office that he never received notification from LFG that he needed to recertify his leave in December, 2020. During this conversation, LFG learned that while the doctor's office was physically closed between December 24 and January 4, the office was still conducting telehealth visits during this time and could have completed the FMLA paperwork. It was also discovered that claimant participated in a telehealth appointment with his physician on December 30, 2020, and he did not mention the recertification forms. The nurse from claimant's doctor's office also relayed that claimant had asked if they would produce a note saying that the office was closed and accepting responsibility for missing the 15-day deadline. Claimant's nurse did not feel comfortable doing this and declined claimant's request.

Claimant presented as a difficult witness, who dodged or otherwise evaded several direct questions from both the undersigned and the employer's representative. Additionally, Claimant was a poor historian, particularly when it came to remembering things that were potentially detrimental to his claim. I do not find claimant to be a credible witness.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant's appeal is untimely and there are not reasonable grounds to consider it timely.

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 § 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to § 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 § 96.5, subsection 10, and has the burden of proving that a voluntary quit pursuant to § 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving § 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 § 96.8, subsection 5.

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. Bd. of Adjustment*, 239 N.W.2d 873 (Iowa 1976).

The decision in this case rests, at least in part, on the credibility of the witnesses. It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness’s testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.*. In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id*.

After assessing the credibility of the witnesses who testified during the hearing, reviewing the exhibits submitted by the parties, considering the applicable factors listed above, and using his own common sense and experience, the administrative law judge finds the employer’s version of events to be more credible than the claimant’s recollection of those events.

During the hearing, the claimant appeared to claim his appeal was delayed because he did not receive the disqualifying decision in the mail. The administrative law judge does not find this allegation credible for a number of reasons:

First and foremost, the claimant made several allegations that strained credulity. For instance, claimant asked his doctor's office to draft a letter stating it was closed between December 24, 2020, and January 4, 2021, and it was their fault the FMLA certification paperwork was not produced on or before the January 7, 2021 deadline. Claimant made this request knowing full well the reason the paperwork was not submitted prior to the deadline was because he had not read the December 24, 2020, letter that he had definitively received. Claimant also made this request knowing he had presented for a telehealth appointment with his physician on December 30, 2020.

When confronted about his failure to timely reply to the demands of the December 24, 2020, letter, claimant provided a number of excuses. Most, if not all, of claimant's excuses were later determined to be untruthful.

When he was notified that his FMLA had been denied due to the fact he failed to respond to the December 24, 2020, recertification letter in a timely manner, claimant asserted he never received the December 24, 2020, letter. When claimant was told that the letter was sent via e-mail, claimant told the LFG manager that he had told the LFG representative that conducted his initial in-take call in September 2020, that his preferred method of contact was verbal communication. When the recording of claimant's in-take call was reviewed and LFG had confirmed that claimant did not ask for verbal communication, claimant asserted that he also asked for all communications to be sent via certified mail. While claimant did initially ask for correspondence to be mailed, he did not specifically request that they be sent via certified mail. Moreover, claimant opted to list e-mail as his preferred method of communication. This decision was confirmed with claimant multiple times during the initial in-take call.

When it was eventually confirmed that claimant had received the December 24, 2020, e-mail correspondence, claimant asserted that it would not have been possible for him to submit the forms in a timely manner, as his doctor's office was closed between December 24, 2020 and January 4, 2021. It was later discovered that claimant had a telehealth appointment with his physician on December 30, 2020.

When claimant was told of LFG's decision to open a new leave file as opposed to reopening the initial file due to the fact claimant's physician did not provide that he or she was unavailable between December 24, 2020 and January 4, 2021, claimant asserted that LFG must not have received all of the paperwork his physician sent over. When LFG confirmed with claimant that it had received all 15 pages that were sent over by claimant's physician, claimant asserted that LFG must have tampered with the documents.

The administrative law judge finds these claims to be so incredible that it colored the claimant's entire testimony as being suspect.

Second, the undersigned perceived claimant's statements regarding his receipt of the March 19, 2021, decision to be rather evasive and defensive. When asked if he had received the IWD decision in the mail, claimant immediately explained that he did not receive the decision because it was not sent via certified mail. This perception was bolstered when, after being asked if he had any reason to believe he would not have received the March 19, 2021, decision within 2-3 business days, claimant answered, "My understanding is the best way to get something received is to certify it."

The perception was further reinforced when the evidentiary record revealed claimant has made prior claims of notice being insufficient unless it is specifically sent via certified mail. When

claimant initially contacted LFG to discuss the fact that his request for leave had been denied, the LFG representative told claimant a letter was e-mailed to him on December 24, 2020. Claimant reported that he never signed for the letter. The LFG representative reiterated that the letter was e-mailed, not mailed, to claimant. Nevertheless, claimant asked the LFG representative if the letter was sent to him via certified mail, and if it shows that he signed for it. The LFG representative told claimant that LFG does not send certified mail, to which claimant said that they should as the capability to send letters via certified mail has been around since 1995. Similar to the matter at hand, when pressed on whether he received the letter in question, claimant deflected and placed the onus on the sender to prove receipt via certified mail.

Claimant has made it very clear that he has a preference for certified mail. However, claimant confirmed that he does in fact receive non-certified mail at his address. The vast majority of mail is not sent via certified mail. It is the responsibility of the individual – particularly an individual that is anticipating documents from IWD for unemployment benefits – to regularly check one's incoming mail and/or e-mail for important documentation. Such responsibility is not diminished simply because a piece of mail is not certified.

Third, the claimant could not even give approximate details for when he learned of his disqualification from benefits, when he filed his appeal, or how he filed his appeal. For someone that testified he called IWD every day to discuss his claim, it did not appear as though claimant possessed a significant amount of information regarding the same.

Lastly, it is worth noting that even if the undersigned accepted claimant's testimony that he did not receive the IWD decision until April 1, 2021, it would still be difficult to say claimant appealed the matter in a timely manner. According to the appeal application, claimant estimated that he received the IWD decision denying him benefits on or about April 1, 2021. At that time, claimant would have presumably seen the notice at the bottom of the decision notifying him that an appeal needed to be filed by March 29, 2021. Despite this knowledge, claimant did not file his appeal until April 9, 2021. Under the circumstances, I do not find waiting 8 days to file an already late appeal application to be reasonable.

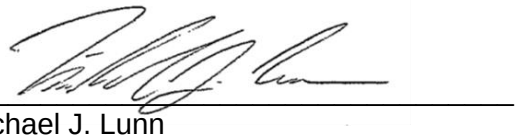
Given these observations, the administrative law judge discounts all of the claimant's testimony as lacking credibility.

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 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. Iowa Dep't of Job Serv.*, 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. Iowa Dep't of Job Serv.*, 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. Iowa Emp't Sec. Comm'n*, 217 N.W.2d 255 (Iowa 1974); *Smith v. Iowa Emp't Sec. Comm'n*, 212 N.W.2d 471, 472 (Iowa 1973). The record shows that the appellant did have a reasonable opportunity to file a timely appeal. Merely providing that the decision was not sent via certified mail, when claimant confirmed he does, in fact, receive non-certified mail, is not sufficient to establish that the appellant was deprived of the opportunity to file a timely appeal due to Agency or United States Postal Service error.

The administrative law judge concludes that failure to file a timely appeal within the time prescribed by the Iowa Employment Security Law was not due to any Agency error or misinformation or delay or other action of the United States Postal Service pursuant to Iowa Admin. Code r. 871—24.35(2). The administrative law judge further concludes that the appeal was not timely filed pursuant to Iowa Code § 96.6(2), and the administrative law judge lacks jurisdiction to make a determination with respect to the nature of the appeal. *See Beardslee v. Iowa Dep't of Job Serv.*, 276 N.W.2d 373 (Iowa 1979); *Franklin v. Iowa Dep't of Job Serv.*, 277 N.W.2d 877 (Iowa 1979).

DECISION:

The March 19, 2021, (reference 01) unemployment insurance decision is affirmed. The appeal in this case was not timely, and the decision of the representative remains in effect.



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July 29, 2021
Decision Dated and Mailed

mjl/lj