IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

WISTON CHERY Claimant **SWIFT PORK COMPANY** Employer	**APPEAL NO. 21A-UI-19550-B2-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 03/28/21** **Claimant: Appellant (1)**

Iowa Code § 96.6-2 – Timeliness of Appeal
Iowa Code § 96.5-1 – Voluntary Quit
Iowa Code § 96.4-3 – Able and Available

STATEMENT OF THE CASE:

Claimant filed an appeal from the May 12, 2021, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on October 25, 2021. The claimant did participate. Employer failed to respond to the hearing notice and did not participate.

ISSUES:

Whether the appeal is timely?

Whether claimant quit for good cause attributable to employer?

Whether claimant is able and available for work?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: A decision was mailed to the claimant's last known address of record on May 12, 2021. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by May 22, 2021. The appeal was not filed until September 3, 2021, which is after the date noticed on the disqualification decision. Claimant stated he did not receive the decision denying him benefits as it was sent to an address where he was no longer receiving mail as his mother moved to Florida. Claimant did state that this was still a good address when asked. Claimant then stated that the above-listed address has been his correct address since May 2021.

Claimant stated he worked for Swift from February 2020 through July 23, 2021. Looking at wage records, claimant was not employed by Swift at all during these time periods. Claimant was hired by Swift in the fourth quarter of 2020 and his job ended there in that same quarter. In spite of the information stated regarding his dates of employment included within the IWD databank claimant insisted that this was not true. The administrative law judge then asked claimant why he filed for unemployment during the period he said he was working at Swift.

Claimant disconnected shortly after the ALJ asked those questions without providing an answer. The ALJ attempted multiple times to reconnect with claimant, but the calls went to voicemail.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.6(2) provides, in pertinent part:

> 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. . . . 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.

The ten calendar days for appeal begin 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 Iowa Admin. Code r. 871-26.2(96)(1) and Iowa Admin. Code r. 871-24.35(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 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 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 potentially 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 is deemed timely filed pursuant to Iowa Code Section 96.6-2, and the administrative law judge retains 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).

Claimant's testimony that he was terminated from his job on July 23, 2020 does not agree with wage information reported from employer that shows claimant was not hired until the fourth quarter of 2020. Claimant additionally stated that employer had claimant sign documents and

as a result of those documents he was not being paid by employer. Claimant then stated that he had Covid symptoms while he was working on the line and told employer that he could not handle the sharp knife while he was coughing so much. Claimant said he asked to do another job, and employer refused. Claimant stated that employer then fired him.

Iowa Code section 96.4(3) provides:

> An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:
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> 3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph (1), or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

Iowa Code section 96.5(1) provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
>
> 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.

It was not shown that claimant was able to do the job for which he was hired as (according to claimant) he could not operate his knife properly as he was coughing too much. As claimant did not provide doctor's documentation that he needed an accommodation for his coughing, employer did not need to move claimant to another position based on claimant's request.

Additionally, claimant's testimony is not credible on many levels. Claimant initially testified his address stated was good, although claimant stated he moved in May from the address and his mother moved to Florida. Claimant then stated that his dates of working were far different than his wage records indicate. Claimant then stated he was terminated for complaining on the line that he could not do his job cutting meat as he was coughing too much. This is not credible. Employer may have sent claimant home for illness, or could have interpreted claimant's statement as a quit.

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*. In this matter, claimant is not seen as providing credible

testimony. As claimant has both changed his testimony in the middle of the hearing and given testimony that is not in conformity with the wage records held by IWD.

The administrative law judge holds that the evidence has failed to establish that claimant voluntarily quit for good cause attributable to employer when claimant terminated the employment relationship because claimant's testimony has not proven a quit, nor a termination as claimant's testimony was not credible.

DECISION:

The May 12, 2021, reference 01, decision is affirmed. Although the appeal in this case was deemed timely, and the decision of the representative remains in effect as claimant has not proven that the quit/ termination would allow him for benefits.

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Blair A. Bennett
Administrative Law Judge

November 05, 2021
Decision Dated and Mailed

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