

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ISMAEL OJEDA
Claimant

APPEAL NO. 16A-UI-10342-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WINNEBAGO INDUSTRIES
Employer

OC: 08/14/16
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Ismael Ojeda filed an appeal from the September 1, 2016, reference 01, decision that disqualified him for benefits and that relieved the employer's account of liability for benefits, based on an agency conclusion that Mr. Ojeda had voluntarily quit effective July 30, 2016 without good cause attributable to the employer. Mr. Ojeda requested an in-person hearing. After due notice was issued, a hearing was held at the Mason City Workforce Development Center on October 26, 2016. Mr. Ojeda participated. Susan Gardner represented the employer. Spanish-English interpreter Amerigo Maldonado assisted with the hearing. Exhibits A through G and I and Department Exhibits D-1 and D-2 were received into evidence.

ISSUES:

Whether the appeal was timely. Whether there is good cause to treat the appeal as timely.

Whether Mr. Ojeda separated from the employment for a reason that disqualifies him for unemployment insurance benefits or that relieves the employer's account of liability for benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Ismael Ojeda is a native Spanish speaker, but has substantial English language skills. On September 1, 2016, Iowa Workforce Development mailed a copy of the September 1, 2106, reference 01, decision to Ismael Ojeda at his last-known address of record. The decision disqualified Mr. Ojeda for benefits, based on an agency conclusion that Mr. Ojeda had voluntarily quit effective July 30, 2016 without good cause attributable to the employer. The decision stated that an appeal from the decision must be postmarked by September 11, 2016 or received by the Appeals Bureau by that date. The decision also stated that if the appeal deadline file on a Saturday, Sunday or legal holiday, the appeal period would be extended to the next working day. September 11, 2016 was a Sunday. The next working day was Monday, September 12, 2016.

Mr. Ojeda did not receive the September 1, 2016, reference 01, decision until on or about September 18, 2016. On September 23, 2016, Mr. Ojeda went to the Mason City Workforce Development Center, completed an appeal form with assistance from a Workforce Advisor, and delivered the completed appeal form to the Workforce Advisor. The Appeals Bureau received the appeal on September 23, 2016.

Mr. Ojeda was employed by Winnebago Industries as a full-time production assembler/fabricator from April 18, 2016 and last performed work for the employer on July 27, 2016. The workplace was in Forest City. Mr. Ojeda resided in Mason City. Mr. Ojeda used a public transit bus to get from Mason City to Forest City. The public bus did not travel between the two communities on weekends. Mr. Ojeda's work hours were 6:00 a.m. to 3:30 p.m., Monday through Friday. The employer also assigned occasional Saturday overtime work, but Mr. Ojeda never performed Saturday overtime work. Mr. Ojeda's immediate supervisor was Production Supervisor Brad Sido.

During his shift on July 25, 2016, Mr. Ojeda experienced shortness of breath and an accelerated heartbeat. Mr. Ojeda went to see the company's onsite medical provider, who decided that Mr. Ojeda should be transported to the emergency room in Mason City. The employer transported Mr. Ojeda to the Forest City ambulance garage and the ambulance service transported Mr. Ojeda to the emergency room in Mason City. At the emergency room, Mr. Ojeda was treated for high blood pressure. Though the emergency room staff wanted to admit Mr. Ojeda to the hospital for overnight observation, Mr. Ojeda declined to be hospitalized. In accordance with Mr. Ojeda's wishes, the emergency room staff discharged him to home, advised him to remain off work the following day, and advised him to avoid situations that might increase his blood pressure. Mr. Ojeda requested that the emergency room staff fax a medical excuse to the employer and the emergency room staff faxed a medical excuse to the employer that supported his need to be off work on July 25 and 26. The employer deemed the July 25-26, 2016 absence excused. Mr. Ojeda returned to work on Wednesday, July 27, 2016 and completed his shift that day.

Mr. Ojeda was next scheduled to work on Thursday, July 28, 2016, but was absent due to illness. Mr. Ojeda had begun to feel the same shortness of breath that he had experienced on July 25. If Mr. Ojeda needed to be absent, the employer's absence reporting policy required that he contact the employer no later than one hour after the scheduled start of his shift. Mr. Ojeda was aware of the absence reporting requirement. Mr. Ojeda did not notify the employer of his need to be absent on July 28. Mr. Ojeda was then absent on Friday, July 29 and did not notify the employer. Mr. Ojeda's cell phone was broken. Mr. Ojeda did not ask a neighbor or friend whether he could use their phone to notify the employer of his need to be absent. The weight of the evidence establishes that Mr. Ojeda's illness did not prevent him from borrowing a phone to provide proper notice to the employer of his need to be absent.

While Mr. Ojeda was absent on July 28-29, the employer had assigned overtime work for Saturday, July 30. Mr. Ojeda was unaware of the overtime work set for that day. When Mr. Ojeda had been a no-call, no-show for the regular shifts on July 28 and 29 and had then been a no-call, no-show for the Saturday overtime work, the employer deemed Mr. Ojeda to have voluntarily quit. The employer's attendance policy deemed an employee who was absent three consecutive days without notifying the employer to have abandoned the employment.

After Mr. Ojeda worked on July 27, 2016 he did not make any further contact with the employer until Monday, August 8, 2016. At that point, Mr. Ojeda was calling to see whether he still had a job. Mr. Ojeda spoke with Susan Gardner, Human Resources Supervisor. At that time, Ms. Gardner notified Mr. Ojeda that the employer had considered him to have voluntarily quit

when Mr. Ojeda was absent for three days of work without notifying the employer. Ms. Gardner invited Mr. Ojeda to reapply. Mr. Ojeda wanted to bypass the reapplication process, but the employer declined to go along with that request.

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. Ojeda's appeal was filed on September 23, 2016, when he delivered the completed appeal to a Workforce Development representative at the Mason City Workforce Development Center.

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. Ojeda did not have a reasonable opportunity to file an appeal by the September 12, 2016 appeal deadline because he did not receive the decision until September 18, 2016. Mr. Ojeda filed his appeal five days later, within a reasonable period of his receipt of the decision. There is good cause to treat Mr. Ojeda's late appeal as a timely appeal. The administrative law judge has jurisdiction to rule on the substance of the appeal.

A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, or failure to pass a probationary period. 871 IAC 24.1(113)(c). A quit is a separation initiated by the employee. 871 IAC 24.1(113)(b).

Iowa Admin. Code r. 871-24.25(4) provides:

Voluntary quit without good cause. 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. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:

(4) The claimant was absent for three days without giving notice to employer in violation of company rule.

The weight of the evidence in the record establishes a voluntary quit without good cause attributable to the employer. The weight of the evidence indicates that Mr. Ojeda was absent on July 28 and 29, without notice to the employer. The weight of the evidence indicates that he was then out of contact with the employer for another week until he made contact with the employer on August 8, 2016 to see whether he still had a job. Only then did the employer communicate to Mr. Ojeda that the employer had deemed him to have voluntarily quit effective July 30, 2016. Mr. Ojeda is disqualified for benefits until he has worked and been paid wages equal to 10 times his weekly benefit amount. Mr. Ojeda must meet all other eligibility requirements. The employer's account will not be charged.

DECISION:

The September 1, 2016, reference 01, decision is affirmed. The claimant voluntarily quit without good cause attributable to the employer. The claimant is disqualified for benefits until he has worked and been paid wages equal to 10 times his weekly benefit amount. The claimant must meet all other eligibility requirements. The employer's account will not be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs