

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TOMMASO COLACCINO
Claimant

APPEAL NO. 15A-UI-01797-S2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

ADAMS CONSTRUCTION
Employer

OC: 09/14/14
Claimant: Appellant (1)

Section 96.5-2-a – Discharge for Misconduct
Section 96.6(2) – Timeliness of Appeal

STATEMENT OF THE CASE:

Tommaso Colaccino (claimant) appealed a representative's October 15, 2014 (reference 02) decision that concluded he was not eligible to receive unemployment insurance benefits because he voluntarily quit work with Adams Construction (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on March 12, 2015. The claimant participated personally. The employer participated by Adam Sterrett, General Contractor. Exhibit D-1 was received into evidence.

ISSUE:

The issue is whether the appeal was filed in a timely manner.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on February 21, 2014 as a full-time roofer. On September 19, 2014 the claimant was on the roof and his stapler slipped out of his bag. It hit a customer's garden shed. The general contractor told the claimant it was like Pottery Barn. If you break it, you buy it. The claimant thought he said you must not want me to work here too bad. He heard the employer say that he did not. The employer remembered the claimant saying maybe he was better off if he did not work. The employer answered that he did not know, maybe the claimant was. The two were working approximately nine feet apart. The claimant was upset by the conversation and walked off the job. The employer did not tell the claimant he was terminated and needed the claimant to work. Continued work was available had the claimant not left work.

A disqualification decision was mailed to claimant's last-known address of record on October 15, 2014 after having a fact finding interview on October 14, 2014. He did receive the decision within ten days. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by October 25, 2014. Another decision about the same separation was mailed to the claimant on December 15, 2015 stating he was eligible to receive unemployment insurance benefits. The fact finding interview was held on December 12, 2015.

The appeal to the October 15, 2014 representative's decision was not filed until February 9, 2015; which is after the date noticed on the disqualification decision.

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 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).

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 have a reasonable opportunity to file a timely appeal.

The claimant argues he was confused by the two decisions issued in the case. It is true that a second decision issued on the same set of facts is confusing. In this case the second decision was not issued until over a month after the appeal in this case was due. The fact-finding interview or the issuance of the second decision would not have been a factor in the claimant's failure to file his appeal.

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 871 IAC 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. IDJS*, 276 N.W.2d 373 (Iowa 1979) and *Franklin v. IDJS*, 277 N.W.2d 877 (Iowa 1979).

DECISION:

The October 15, 2014 (reference 02) decision is affirmed. The appeal in this case was not timely. The decision of the representative remains in effect. The claimant is not eligible to receive unemployment insurance benefits.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

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