IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

JOHN L WEEKS
3329 COTTONWOOD AVE
MACKSBERG IA 50511

DES MOINES INDEPENDENT
COMMUNITY SCHOOL DISTRICT
ATTN: BUSINESS/FINANCE
1801 16TH ST
DES MOINES IA 50314-1902

MARK T HEDBERG
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840 5TH AVE
DES MOINES IA 50309-1307

Appeal Number: 05A-UI-07080-RT
OC: 05/08/05 R: 03
Claimant: Respondent (1)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the ***Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319***.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

Section 96.4-3 - Required Findings (Able and Available for Work)
Section 96.7-2-a-2 – Employer Contributions and Reimbursements Different Employment, (Benefits Charged)
Section 96.3-7 – Recovery of Overpayment of Benefits
Section 96.6-2 – Initial Determination (Timeliness of Appeal)
Section 96.5-1 – Voluntary Quitting
Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The employer, Des Moines Independent Community School District, filed an appeal from an unemployment insurance decision dated June 16, 2005, reference 03, allowing unemployment insurance benefits to the claimant, John L. Weeks. After due notice was issued, a telephone hearing was held on July 28, 2005, with the claimant participating. The claimant was represented by Mark T. Hedberg, Attorney at Law. Cathy McKay, participated in the hearing for

the employer. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant. Department Exhibit One and Claimant's Exhibits A through C were admitted into evidence.

Although not set out on the notice of appeal, the parties permitted the administrative law judge to take evidence on and decide, if necessary, whether the claimant had separated from his employment permanently, and, if so, whether that separation was disqualifying. The parties waived further notice of this issue.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Department Exhibit One and Claimant's Exhibits A through C, the administrative law judge finds: An unemployment insurance decision dated June 16, 2005, reference 03, determined that the claimant was eligible to receive unemployment insurance benefits. That decision was sent to the employer on June 16, 2005. That decision indicated that an appeal had to be post marked or otherwise received by the Appeals Section by June 27, 2005 (the decision actually said June 26, 2005, but since that was a Sunday, the appeal would be due the next business or working day). However, the employer did not appeal the decision until it faxed the appeal letter to the Appeals Section, which was received by the Appeals Section on July 8, 2005 as shown at Department Exhibit One. The letter is dated July 8, 2005. The appeal was 11 days late. The appeal was late because the employer did not receive the decision until June 27, 2005, which was after the deadline as set out on the decision. The employer's witness, Cathy McKay, was not in the office that day. The next day or two, Ms. McKay called Iowa Workforce Development and eventually played phone tag with Iowa Workforce Development until she spoke to someone on or about July 6, 2005. That person told the employer to go ahead and appeal and the employer did so.

Because the administrative law judge hereinafter concludes that the employer's appeal was late, but that the employer has demonstrated good cause for delay in the filing of its appeal, the administrative law judge further finds: The claimant began his employment with the employer on August 24, 1994 and has not permanently separated from his employment. His employment is grounds maintenance full time. On September 10, 2001, the claimant injured his back at work which injury was related to his employment. Thereafter, the claimant worked on and off for the employer until permanent restrictions were placed on the claimant on September 3, 2004 as shown at Claimant's Exhibit B. The claimant last worked for the employer on August 19, 2004.

From the date of the injury until August 19, 2004, the employer had light-duty work available, at least off and on, for the claimant including concrete work and welding and assembling playground equipment and moving snow and office work which would meet the claimant's restrictions at least as they were at the time. However, the employer now maintains that it cannot meet or accommodate the claimant's restrictions as shown at Claimant's Exhibit C. The claimant is permanently restricted to a maximum occasional lift of 20 pounds and to frequent lifting of a maximum of 10 pounds and no constant lifting and alternate sitting and standing and perhaps some avoidance of bending, stooping, and twisting.

The claimant has never informed the employer specifically that he has left his employment nor has the employer ever specifically informed the claimant that he was fired or discharged. Beginning on or about September 3 or 4, 2004, the claimant has attempted to contact various individuals through the employer. He successfully contacted his foreman, Wendell Duncan and

indicated that he was ready to return to work, but Mr. Duncan referred the claimant to others. The claimant was not able to speak to others except for Mr. Duncan's supervisor who gave the claimant no satisfaction informing the claimant that he needed to talk to the employer's witness, Cathy McKay. The claimant repeatedly attempted to call her and others, but no one returned his calls. The claimant is released to return to work with the permanent restrictions as noted above and set out at Claimant's Exhibit B.

The claimant has placed no other restrictions on his physical ability to work nor has he placed any restrictions on the times or days when he could or could not work involving his availability for work. The claimant is earnestly and actively seeking work by making two in-person job contacts each week. The claimant is seeking work in convenience stores, auto parts stores, and home improvement business. The claimant believes that at least the work for the stores would meet his restrictions. When the claimant first contacted his foreman on September 3 or 4, 2004, he offered to return to work and provided his foreman with the letter as shown at Claimant's Exhibit B. The claimant is continuing to receive employee benefits including medical insurance from the employer.

Pursuant to his claim for unemployment insurance benefits filed effective May 8, 2005, the claimant has received unemployment insurance benefits in the amount of $3,864.00 as follows: $322.00 per week for 12 weeks from benefit week ending May 14, 2005 to benefit week ending July 30, 2005.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the employer filed a timely appeal of the decision dated June 16, 2005, reference 03, or, if not, whether the employer demonstrated good cause for such failure. The employer's appeal was not timely but the employer has demonstrated good cause for its delay and such appeal should be accepted. The administrative law judge has jurisdiction to reach the remaining issues.

2. Whether the claimant is ineligible to receive unemployment insurance benefits because at relevant times he is and was not able, available, and earnestly and actively seeking work. The claimant is not ineligible to receive unemployment insurance benefits for these reasons.

3. Whether the account of the employer should be charged for any unemployment insurance benefits to which the claimant is entitled because the claimant was not receiving the same employment that he had received during his base period. The administrative law judge concludes that the claimant is not receiving the same employment that he did during his base period and therefore, any benefits to which the claimant is entitled shall be charged to the account of the employer herein.

4. Whether the claimant has separated permanently from his employment and, if so, whether the separation is disqualifying. The claimant has not separated from his employment permanently.

5. Whether the claimant is overpaid unemployment insurance benefits. He is not.

Iowa Code section 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).

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 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).

(2) The record shows that the appellant did not have a reasonable opportunity to file a timely appeal.

871 IAC 24.35(1) provides:

> (1) Except as otherwise provided by statute or by department rule, any payment, appeal, application, request, notice, objection, petition, report or other information or document submitted to the department shall be considered received by and filed with the department:
>
> a. If transmitted via the United States postal service or its successor, 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 is 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.
>
> b. If transmitted by any means other than the United States postal service or its successor, on the date it is received by the department.

871 IAC 24.35(2) provides:

> (2) The submission of any payment, appeal, application, request, notice, objection, petition, report or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the department that the delay in submission was due to department error or misinformation or to delay or other action of the United States postal service or its successor.
>
> a. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.
>
> b. The department shall designate personnel who are to decide whether an extension of time shall be granted.
>
> c. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the department after considering the circumstances in the case.
>
> d. If submission is not considered timely, although the interested party contends that the delay was due to department error or misinformation or delay or other action of the United States postal service or its successor, the department shall issue an appealable decision to the interested party.

The administrative law judge concludes that the employer has the burden to prove that its appeal was timely or that it had good cause for the delay in the filing of its appeal. The administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that although its appeal was not timely, it had good cause for the delay in the filing of its appeal. The employer's witness, Cathy McKay, credibly testified that the employer did not receive the decision from which it now seeks to appeal until June 27, 2005. By that time, according to the decision, the appeal was already late. Although the decision was actually due that day, the decision read that the appeal was due June 26, 2005. Ms. McKay credibly testified that she was not in the office on June 27,

2005 and when she returned to the office on June 28 or 29, 2005 she attempted to contact Iowa Workforce Development rather than file the appeal because she knew the appeal was late. Eventually, she contacted Iowa Workforce Development and was informed to file the appeal. The employer's appeal appears at Department Exhibit One. On its face, the appeal was not received by the Appeals Section until July 8, 2005 making the appeal 11 days late. However, the administrative law judge is constrained to conclude that the delay in filing its appeal was because the decision was not promptly delivered by the United States Postal Service to the employer. Accordingly, the administrative law judge concludes that although the employer's appeal was not timely, the employer has demonstrated good cause for a delay in the filing of its appeal and, as a consequence, the employer's appeal should be accepted and the administrative law judge has jurisdiction to reach the remaining issues.

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:
>
> 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".

871 IAC 24.22(1)a provides:

> Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.
>
> (1) Able to work. An individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood.
>
> a. Illness, injury or pregnancy. Each case is decided upon an individual basis, recognizing that various work opportunities present different physical requirements. A statement from a medical practitioner is considered prima facie evidence of the physical ability of the individual to perform the work required. A pregnant individual must meet the same criteria for determining ableness as do all other individuals.

The administrative law judge concludes that the claimant has the burden of proof to show that he is able, available, and earnestly and actively seeking work under Iowa Code section 96.4-3 or is otherwise excused. New Homestead v. Iowa Department of Job Service, 322 N.W.2d 269 (Iowa 1982). The administrative law judge concludes that the claimant has met his burden of proof to demonstrate by a preponderance of the evidence that he is able, available, and earnestly and actively seeking work. The claimant credibly testified that he has placed no restrictions on the days or hours when he could or could not work involving his availability for

work and further credibly testified that he is earnestly and actively seeking work by making two in-person job contacts each week. There is no evidence to the contrary.

The claimant has permanent physical restrictions placed upon him for work as shown at Claimant's Exhibit B including an occasional lift of a maximum of 20 pounds and a frequent lifting maximum of 10 pounds and no constant lifting and the ability to alternate sitting and standing as needed and perhaps to avoid bending, stooping, and twisting. The evidence establishes that off and on the employer was able to meet some or all of these restrictions with light duty. However, once the restrictions became permanent, the employer was not able to meet those restrictions or at least refuses to meet those restrictions as shown at Claimant's Exhibit C. The claimant testified that the light duty offered at least off and on by the employer met his restrictions. The issue as to the ability to work only requires that the claimant be physically and mentally able to work in some gainful employment not necessarily in his customary occupation. The administrative law judge concludes that there is a preponderance of the evidence that the claimant is physically and mentally able to work in some gainful employment. The claimant credibly testified that he is earnestly and actively seeking work in convenience stores and auto parts stores and believes that these meet his restrictions and it appears that they do. The administrative law judge also notes that the employer did have some work that would meet the claimant's restrictions. Accordingly, the administrative law judge concludes that the claimant is able to work.

In summary, the administrative law judge concludes that the claimant is able, available, and earnestly and actively seeking work and, as a consequence, he is not ineligible to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant provided he is otherwise eligible and remains able, available, and earnestly and actively seeking work. The administrative law judge does not find it necessary to determine whether the claimant is excused from such provisions because he is able, available, and earnestly and actively seeking work. However, the administrative law judge notes that he concludes hereafter that the claimant is not separated from his employment and therefore he would be at least for the time temporarily unemployed as defined in Iowa Code section 96.19(38)(c), and would be excused from the positions that require him to be available for work and earnestly and actively seeking work. The claimant would still have to be able to work but as noted above, the administrative law judge concludes that the claimant is able to work.

Iowa Code section 96.7-2-a(2) provides:

> 2. Contribution rates based on benefit experience.
>
> a. (2) The amount of regular benefits plus fifty percent of the amount of extended benefits paid to an eligible individual shall be charged against the account of the employers in the base period in the inverse chronological order in which the employment of the individual occurred.
>
> However, if the individual to whom the benefits are paid is in the employ of a base period employer at the time the individual is receiving the benefits, and the individual is receiving the same employment from the employer that the individual received during the individual's base period, benefits paid to the individual shall not be charged against the account of the employer. This provision applies to both contributory and reimbursable employers, notwithstanding subparagraph (3) and section 96.8, subsection 5.

> An employer's account shall not be charged with benefits paid to an individual who left the work of the employer voluntarily without good cause attributable to the employer or to an individual who was discharged for misconduct in connection with the individual's employment, or to an individual who failed without good cause, either to apply for available, suitable work or to accept suitable work with that employer, but shall be charged to the unemployment compensation fund. This paragraph applies to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.
>
> The amount of benefits paid to an individual, which is solely due to wage credits considered to be in an individual's base period due to the exclusion and substitution of calendar quarters from the individual's base period under section 96.23, shall be charged against the account of the employer responsible for paying the workers' compensation benefits for temporary total disability or during a healing period under section 85.33, section 85.34, subsection 1, or section 85A.17, or responsible for paying indemnity insurance benefits.

The administrative law judge concludes that the claimant is not receiving the same employment from the employer from and after the time that he filed for unemployment insurance benefits effective May 8, 2005 that he received during his base period because the claimant is now provided no hours and no work, but during his base period was provided at least employment on and off following his employment related injury and further had full time work prior to his injury. Accordingly, the administrative law judge concludes that the claimant is not receiving the same employment from the employer that he received during his base period and during other relevant times and, as a consequence, any unemployment insurance benefits to which the claimant is entitled may be charged against the account of the employer herein. The account of the employer herein is not relieved of any charges for benefits to which the claimant is entitled.

Iowa Code section 96.5-1 provides:

> An individual shall be disqualified for benefits:
>
> 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.

Iowa Code section 96.5-2-a provides:

> An individual shall be disqualified for benefits:
>
> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
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> a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

871 IAC 24.32(1)a provides:

> Discharge for misconduct.
>
> (1) Definition.

> a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The administrative law judge concludes that there is not a preponderance of the evidence that the claimant has actually separated permanently from his employment. The employer's witness, Cathy McKay, credibly testified that the claimant is not permanently separated from his employment but the employer considers that he remains job attached and is simply not working for the employer because of his employment related injuries. Ms. McKay credibly testified that the claimant is still receiving benefits including medical insurance. The claimant testified that he believed that he was currently separated but could give no particular form of separation. There is no evidence the claimant has ever informed anyone that he has quit his employment or in fact has quit his employment nor is there any evidence that the claimant was ever told that he was fired or discharged or that in fact he was fired or discharged. Accordingly, the administrative law judge concludes that the claimant has not currently separated from his employment and, as a consequence, he is not disqualified to receive unemployment insurance benefits if he is otherwise eligible. The administrative law judge notes that this would be the same result had the claimant voluntarily left his employment because of a work related injury because the evidence establishes that the claimant's injury was work related and the claimant had informed the employer of his work related injuries and had requested accommodation which had been denied. See 871 IAC 24.26(6)(b). The administrative law judge concludes that the result would be the same also if the claimant was discharged. There is no evidence of any disqualifying misconduct on the part of the claimant that would disqualify him from benefits pursuant to a discharge. See Iowa Code section 96.5(2)(a) and 871 IAC 24.32(1)(a).

Iowa Code section 96.3-7 provides:

> 7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.
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> If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment

compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of $3,864.00 since filing for such benefits effective May 8, 2005. The administrative law judge concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

DECISION:

The representative's decision of June 16, 2005, reference 03, is affirmed. The claimant, John L. Weeks, is entitled to receive unemployment insurance benefits, provided he is otherwise eligible, because is able, available, and earnestly and actively seeking work and has not been permanently separated from his employment. Any unemployment insurance benefits to which the claimant is entitled may be charged to the account of the employer herein because the claimant is not receiving the same employment from the employer as he had previously. As a result of this decision, the claimant is not overpaid any unemployment insurance benefits arising out of his employment with the employer herein. The employer has demonstrated good cause for a delay in the filing of its appeal and the appeal is, therefore, accepted.

kjf/kjw