IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

CESAR VIERA
Claimant

AGRI STAR MEAT & POULTRY LLC
Employer

APPEAL NO: 11A-UI-01849-DWT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 01/02/11
Claimant: Appellant (2)

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

PROCEDURAL STATEMENT OF THE CASE:

The claimant appealed a representative's February 3, 2011 determination that disqualified him from receiving benefits and held the employer's account subject to charge because he had been discharged for disqualifying reasons. The claimant participated in the hearing. Laura Alphouse appeared on the employer's behalf. Based on the evidence, the arguments of the parties, and the law, the administrative law judge finds the claimant qualified to receive benefits.

ISSUES:

Did the claimant file a timely appeal or establish a legal excuse for filing a late appeal?

Did the employer discharge the claimant for reasons constituting work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer in late April 2010 as a full-time general laborer. When the claimant started working, the employer informed him about the employer's drug and alcohol policy. The policy informs employees that the employer can require employees involved in an accident at work to submit to a post accident drug and alcohol test.

Toward the end of his shift on December 1, the claimant hurt his ankle at work. The claimant's supervisor knew the claimant was hurt and sent him to the nurse's station. The nurse was not at work. The claimant did not receive any medical for his injured ankle on December 1. When the claimant went to work on December 2, he again went to the nurse's station. This time the employer took the claimant to the hospital for treatment. The employer sent paperwork with the claimant authorizing treatment under workers' compensation and a request for a drug test. Even though the claimant reminded hospital personnel about the drug test, the hospital did not do a drug test. The claimant was not satisfied with the treatment he received at the hospital because no one put ice on his ankle, wrapped it, gave him a brace or even suggested that he use crutches. The doctor who treated him restricted him to light duty work. When the claimant returned to work on December 2, the employer's nurse wrapped his ankle and told the claimant

she was surprised the hospital had not done this. By the time the hospital realized a drug test had not been taken, the claimant had gone home from work.

On December 5, after the claimant reported to work, the employer asked him to go back to the hospital for more tests. Based on the substandard treatment the claimant received on December 2, he told the employer he did not want to go back to that hospital. When the claimant refused to go back to the hospital, the employer discharged him on December 5, 2010, for refusing to go back to the hospital for a post-accident drug test.

The claimant established a claim for benefits during the week of January 2, 2011. On February 3, 2011 a representative's determination was mailed to the claimant and employer. The claimant's determination was not mailed to his current mailing address in Texas. The determination disqualified the claimant from receiving unemployment insurance benefits as of January 2, 2011. The determination also informed the parties an appeal had to be filed or postmarked on or before February 13, 2011.

The claimant did not receive the representative's determination until February 12. He went to the town library on February 13 to fax his appeal, but it was closed. He faxed his appeal as soon as possible. The Appeals Section indicated the claimant's appeal was received on February 16 but it is not known if he faxed it late on February 15 or on February 16, 2011.

REASONING AND CONCLUSIONS OF LAW:

Unless the claimant or other interested party, after notification or within ten calendar days after a representative's determination is mailed to the parties' last-known address, files an appeal from the determination; it is final. Benefits shall then be paid or denied in accordance with the representative's determination. Iowa Code § 96.6(2). 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 Iowa Supreme Court has ruled that appeals from unemployment insurance determinations must be filed within the time limit set by statute and the administrative law judge has no authority to review a determination if a timely appeal is not filed. *Franklin v. IDJS,* 277 N.W.2d 877, 881 (Iowa 1979); *Beardslee v. IDJS*, 276 N.W.2d 373 (Iowa 1979). In this case, the claimant's appeal was filed after the February 14, 2011 deadline for appealing expired. Since February 13 was a Sunday, the deadline to appeal was automatically extended to Monday, February 14, 2011.

The next question is whether the claimant had a reasonable opportunity to file 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 evidence establishes the claimant did not have a reasonable opportunity to file a timely appeal because it was not sent to his current mailing address and had to be forwarded to Texas.

The evidence indicates the claimant attempted to fax his appeal on Sunday, February 13, but could not find a public facility or a business open to fax his appeal. The claimant faxed his appeal on February 15 or 16. Since the claimant filed his appeal within a couple of days of receiving the determination, he established a legal excuse for filing a late appeal. Therefore, the Appeals Section has jurisdiction to make a decision on the merits of the claimant's appeal.

A claimant is not qualified to receive unemployment insurance benefits if an employer discharges him for reasons constituting work-connected misconduct. Iowa Code § 96.5(2). For

unemployment insurance purposes, misconduct amounts to a deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment. Misconduct is a deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees or is an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated incidents, or good faith errors in judgment or discretion are not deemed to constitute work-connected misconduct. 871 IAC 24.32(1)(a).

The Iowa Supreme Court has ruled that an employer cannot establish disqualifying misconduct based on a drug test performed in violation of Iowa's drug testing laws. *Harrison v. Employment Appeal Board*, 659 N.W.2d 581 (Iowa 2003); *Eaton v. Employment Appeal Board*, 602 N.W.2d 553, 558 (Iowa 1999). As the court in Eaton stated, "It would be contrary to the spirit of chapter 730 to allow an employer to benefit from an unauthorized drug test by relying on it as a basis to disqualify an employee from unemployment compensation benefits." *Eaton*, 602 N.W.2d at 558. Iowa Code § 730.5(1)h states an employer ask an employee to submit to a post accident drug test. The employer's policy informs employee that if they refuse to submit to a requested drug test, the employee's employment will end. On December 2, when the claimant was at the hospital he understood the employer wanted a drug test and he was willing to take the requested drug test. He even reminded hospital personnel to do the test, but they still forgot. On December 5, the claimant testified the employer only told him he needed to go back to the hospital for more tests, not specifically a drug test. Since the claimant's experience at the hospital on December 2 was less than satisfactory, he informed the employer that he did not want to go back to the same hospital or clinic. The claimant testified that if the employer had told him he needed a drug test, he would have complied since he takes drug tests every two weeks as a condition of his probation. The employee who talked to the claimant on December 5 about going back to the hospital for more tests did not participate in the hearing. As a result, the claimant's version of the December 5 conversation must be given more weight than the employer's reliance on hearsay information from an employee who did not testify at the hearing. Since the employer did not tell the claimant he had to go to back to the hospital or clinic just for a drug and alcohol test, the evidence does not establish that the employer requested the claimant to take a drug and alcohol test on December 5, 2010. The claimant's refusal to go back to the hospital for "more" tests was reasonable based on the unsatisfactory experience he had on December 2, 2010. The claimant cannot be disqualified from receiving benefits when the employer did not tell him he had to go to the hospital again on December 5 to take a drug test the hospital forgot to do on December 2. As of January 2, 2011, the claimant is qualified to receive benefits.

DECISION:

The representative's February 3, 2011 determination (reference 01) is reversed. The claimant did not file a timely appeal, but established a legal excuse for filing a late appeal when his determination was not sent to his current address in Texas. The Appeals Section has

jurisdiction to address the merits of his appeal. The employer discharged the claimant for business reasons, but did not establish that the claimant committed work-connected misconduct. As of January 2, 2011, the claimant is qualified to receive benefits, provided he meets all other eligibility requirements. The employer's account is subject to charge.

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Debra L. Wise
Administrative Law Judge

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Decision Dated and Mailed

dlw/pjs