

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SHAWN K NICKERSON
Claimant

APPEAL NO: 14A-UI-09266-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CNH AMERICA LLC
Employer

OC: 07/28/13
Claimant: Appellant (2/R)

Section 96.5-2-a – Discharge
Section 96.6-2 – Timeliness of Appeal

STATEMENT OF THE CASE:

Shawn K. Nickerson (claimant) appealed a representative's May 1, 2014 decision (reference 02) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on September 25, 2014. The claimant participated in the hearing. Jill Dunlop appeared on the employer's behalf. During the hearing, Exhibit A-1 was entered into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Was the claimant's appeal timely or are there legal grounds under which it should be treated as timely? Was the claimant discharged for work-connected misconduct?

OUTCOME:

Reversed. Benefits allowed.

FINDINGS OF FACT:

The representative's decision was mailed to the claimant's last-known address of record on May 1, 2014. The claimant did not receive the decision at that time because he had moved from that address and was homeless for a time. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section effectively by May 12, 2014. The appeal was not filed until August 15, 2014, which is after the date noticed on the disqualification decision. The claimant appealed at that time because he had been told the decision had been made against him but his doctor advised him that he should appeal.

The claimant started working for the employer on May 14, 2012. He worked full time as a weld floater on the second shift in the employer's Burlington, Iowa agricultural and construction equipment manufacturing business. His last day of work was April 8, 2014. The employer

suspended him on that date and discharged him on April 11, 2014. The reason asserted for the discharge was insubordination and work quality issues.

The claimant had been diagnosed with multiple sclerosis (MS) in about June 2013. In late March or early April 2014 he was starting to have an acute flare up, but he did not recognize that was the case at the time. On April 7 the claimant had an argument with his supervisor about his use of his cell phone at work; he became belligerent, and was given a written warning. On April 8 the claimant was working slowly and was having weld quality issues. His supervisor began to watch him more closely. When questioned, the claimant indicated that he was going slower because he knew the supervisor was watching. The supervisor assumed that the claimant was intentionally working poorly and going slow to "peg" production in effect as a protest against the warning he had been given the prior night. However, in fact the claimant was having trouble with his vision and coordination; his poor and slow performance was due to the flare up of his condition which was beginning to set in. The claimant realized that he was having problems focusing and that this was causing problems with his weld quality, and realized his supervisor was watching him, and so did slow down in an attempt to improve his work quality. But because the supervisor concluded that the conduct was intentional with the purpose only to slow production and was insubordination, the employer discharged the claimant.

By the end of April and early May 2014 the claimant's condition had deteriorated to the point where he could not walk and did not have control over his bodily functions. He subsequently sought additional medical treatment and has had some improvement. As of the date of the hearing in this matter it was not clear whether the claimant had improved to the point of being able to perform some work.

REASONING AND CONCLUSIONS OF LAW:

The preliminary issue in this case is whether the claimant timely appealed the representative's decision. Iowa Code § 96.6-2 provides that unless the affected party (here, the claimant) files an appeal from the decision within ten calendar days, the decision is final and benefits shall be paid or denied as set out by the decision.

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 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 due to Agency error or misinformation or delay or other action of the United States Postal Service pursuant to rule 871 IAC 24.35(2), or other factor outside of the claimant's control. The administrative law judge further concludes that the appeal should be treated as timely filed pursuant to Iowa Code § 96.6-2. Therefore, the administrative law judge has jurisdiction to make a determination with respect to the nature of the appeal. See, *Beardslee*, supra; *Franklin*, supra; and *Pepsi-Cola Bottling Company v. Employment Appeal Board*, 465 N.W.2d 674 (Iowa App. 1990).

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate matters. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. Rule 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. Rule 871 IAC 24.32(1)a; *Huntoon*, supra; *Henry*, supra. In contrast, 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. 871 IAC 24.32(1)a; *Huntoon*, supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

The reason cited by the employer for discharging the claimant is that the claimant had intentionally slowed down production and had poor work quality because of being belligerent. Misconduct connotes volition. A failure in job performance is not misconduct unless it is intentional. *Huntoon*, supra. Under the circumstances of this case, the claimant's poor work quality and slowing of production on April 8 was the result of a medical condition, not an intentional act. The employer has not met its burden to show disqualifying misconduct. *Cosper*, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

An issue as to whether the claimant is or has been able and available for work. This issue was not included in the notice of hearing for this case, and the case will be remanded for an investigation and preliminary determination on that issue. Rule 871 IAC 26.14(5).

DECISION:

The appeal in this case is treated as timely. The representative's May 1, 2014 decision (reference 02) is reversed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible. The matter is remanded to the Claims Section for investigation and determination of the able and available issue.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs