IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

ROBERT K ZIATY
Claimant

FARMLAND FOODS INC
Employer

APPEAL NO: 14A-UI-04759-DWT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 02/03/13
Claimant: Appellant (1)

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 28, 2014 determination (reference 05) that disqualified him from receiving benefits and held the employer's account exempt from charge because he had been discharged for disqualifying reasons.

Hearings were scheduled on May 28, June 27, July 17 and August 13, 2014. On May 28, the administrative rescheduled the hearing to June 27 so a certified interpreter would be at the hearing. Even though an interpreter was present on June 27, the administrative law stopped the hearing because of problems with the interpreter, K.S. Another Krahn interpreter was scheduled to interpret at the July 17 hearing. This hearing had to be continued because the interpreter's, L.S., cell phone prevented a good phone connection.

A hearing was held on August 13, 2014, with Charles Cooper as the interpreter. The claimant participated at the hearing. Becky Jacobsen, the human resource manager, appeared on the employer's behalf. Based on the evidence, the arguments of the parties, and the law, the administrative law judge concludes the claimant is not 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 on May 21, 2013. He worked as a full-time employee. The employer's drug and alcohol policy informs employees the employer can ask an employee to submit to a drug and alcohol test if there is reasonable suspicion the employee is under the influence at work.

On January 13, 2014, a co-worker reported the claimant had problems walking and talking. The co-worker noticed the claimant was slurring his words. The employer's nurse screened the

claimant for drugs and alcohol. While some of the tests indicated the claimant may be intoxicated, the screening tests were inconclusive. The employer then sent the claimant to a certified alcohol technician, Dr. Anderson. Dr. Anderson used equipment certified by the State of Iowa and took performed two Breathalyzer tests. The tests were completed 18 minutes apart. The first test result was a BAC reading of 0.213 and the second was 0.215. The employer suspended claimant on January 13, 2014.

On January 20, 2014, Jacobsen received the claimant's January 13 test results. The employer sent the claimant a January 20 letter advising him about the results of the January 13 alcohol tests. The January 20 letter indicated that if the claimant had any question, he could call the employer. The claimant did not call the employer even though he did not believe he violated the employer's alcohol policy. While the claimant drank Budweiser on Sunday, January 12, he did not have anything to drink before he went to work on January 13. The claimant's shift started at 4 p.m. On January 13, the claimant took prescribed medication.

Employees who have not worked 12 months for the employer are not eligible to go to treatment and continue their employment. The employer's policy informs employees that any test result above 0.02 violates the employer's drug and alcohol policy. The employer discharged the claimant on January 29, for reporting to work under the influence and violating the employer's alcohol policy.

The claimant reopened his claim for benefits during the week of January 26, 2014. A February 28, 2014 determination was mailed to both parties. This determination held the claimant disqualified from receiving benefits and informed the parties an appeal had to filed or postmarked on or before March 10, 2014. The claimant does not remember when he received the determination, but did not file any weekly claims after the week ending February 2, 2014. After the claimant received an April 29, 2014 overpayment determination, he filed an appeal on May 8, 2014. If the claimant had not received the overpayment determination, he would not have appealed.

REASONING AND CONCLUSIONS OF LAW:

The law states that an unemployment insurance determination is final unless a party appeals the determination within ten days after the determination was mailed to the party's last known address. Iowa Code § 96.6(2). The Iowa Supreme Court has ruled that appeals must be filed within the time limit set by statute and the administrative law judge has no authority to review a decision 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 appeal was filed two months after the March 10, 2014 deadline for appealing expired.

The next question is whether the claimant had a reasonable opportunity to file a timely appeal. *Hendren v. IESC*, 217 N.W.2d 255 (Iowa 1974); *Smith v. IESC*, 212 N.W.2d 471, 472 (Iowa 1973). Even though the claimant does not remember when he received the February 28 determination, it is logical to assume he received it shortly after it was mailed because he did not file any weekly claims after this determination was issued. The claimant even acknowledged that if he had not received the overpayment determination, he would not have appealed. The evidence indicates the claimant had a reasonable opportunity to file a timely appeal, but did not.

The claimant's failure to file a timely appeal was not due to any Agency error or misinformation or delay or other action of the United States Postal Service, which under 871 IAC 24.35(2) would excuse the delay in filing an appeal. The claimant did not establish a legal excuse for

filing a late appeal. The Appeals Bureau does not have legal authority to make a decision on the merits of the appeal. As a result, the claimant remains disqualified from receiving benefits as of January 26, 2014.

In the alternative, if the claimant has a legal excuse for filing a late appeal, the employer discharged him for reasons that constitute work-connected misconduct. The law defines misconduct as:

> 1. A deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment.
> 2. A deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees. Or
> 3. 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 do not amount to work-connected misconduct. 871 IAC 24.32(1)(a).

Based on the BAC readings, that a certified alcohol technician obtained from the claimant on January 13, 2014, the claimant violated the employer's alcohol policy when he reported to work with a BAC of more than 0.04. Even though the claimant asserted he did not have anything to drink on January 13, he admitted he drank beer on Sunday, January 12. The claimant did not present evidence to explain why his BAC was over 0.20. Even though the claimant asserted the employer discharged him because of other health issues, the evidence does not support this assertion. Instead, the employer discharged the claimant for reasons that constitute work-connected misconduct. As of January 26, 2014, the claimant is not qualified to receive benefits.

DECISION:

The representative's February 28, 2014 determination (reference 05) is affirmed. The claimant did not file a timely appeal or establish a legal excuse for filing a late appeal. As a result, the Appeals Bureau does not have jurisdiction to address the merits of the claimant's appeal. As of January 26, 2014, the claimant remains disqualified from receiving benefits. This disqualification continues until he has been paid ten times his weekly benefit amount for insured work, provided he is otherwise eligible. The employer's account will not be charged.

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Debra L. Wise
Administrative Law Judge

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Decision Dated and Mailed

dlw/css