IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

ANTHONY P CAMEJO Claimant **VAN DIEST SUPPLY CO** Employer	**APPEAL 17R-UCX-00005-JCT** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 06/04/17** **Claimant: Appellant (1R)**

Iowa Code § 96.6(2) – Timeliness of Appeal
Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from the July 12, 2017, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A first hearing was scheduled between the parties on August 18, 2017. The claimant/appellant failed to appear at the hearing, and the appeal was dismissed. Upon a remand decision from the Employment Appeal Board, the appellant's request to reopen the hearing was granted. Notice of the second hearing was mailed to the parties' last known addresses of record. A telephone hearing was held on October 10, 2017. The claimant participated personally. The employer participated through Erika Bertrand, attorney at law. Nola Cartmill participated as an employer observer. Carolyn Cross, personnel manager, testified for the employer. Department Exhibit D-1 was received into evidence. The administrative law judge took official notice of the administrative records including the fact-finding documents. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Is the appeal timely?
Did claimant voluntarily quit the employment with good cause attributable to employer or was the claimant discharged for misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as a production operator and was separated from employment on June 26, 2017.

The employer has an attendance policy which designates point values for attendance infractions. An employee begins with eight available points and is discharged upon having a negative balance. An employee is also expected to notify the employer the day of a shift, with at least one hour's notice, if they are unable to perform work. A failure to call in or work ("no

call/no show") for three consecutive days will result in separation by job abandonment. The claimant was made aware of the employer policies upon hire.

The claimant began employment March 6, 2017, and prior to hire, he was required to and passed a fit-for-duty physical, administered through the employer's doctors. The claimant did not disclose to the employer a pre-existing injury to his wrist that he had incurred through his military experience. On March 30, 2017, the claimant visited his personal doctor in response to pain with his wrist (Department Exhibit D-1). The claimant did not notify the employer of his appointment, or that he went to a second appointment on April 24, 2017, where his doctor issued a twenty pound lifting restriction (Department Exhibit D-1). The claimant's job required him to lift more than twenty pounds and he did not inform the employer of the restriction, but rather continued to work until May 10, 2017, when he visited a specialist, who confirmed the weight restriction.

On May 11, 2017, the claimant properly reported his absence, stating he had a personal injury. On May 12, 2017, the claimant spoke to the employer, and informed the employer of the weight restriction. He was informed that he could not return to work until he was cleared without restriction by his doctor, and that until he healed, he could report his absences once a week, beginning Monday, May 15, 2017. The claimant called the employer on May 15 and 22, 2017, per the employer directives, and spoke to assistant personnel manager, Jane, to provide updates. On Tuesday, May 30, 2017, the claimant called and spoke to Jane. He told her that his return to work date was now unknown. Jane reminded the claimant he could not return until released from the doctor. According to the claimant, Jane also told him he no longer had to report back to the employer. He then filed for unemployment with an effective date of June 4, 2017, indicating the employer would not let him work. He made no other contact with the employer between May 30 and June 26, 2017. He provided no medical documentation to update the employer of his condition. The claimant stated he believed his job would be held open for him until he healed, even though he was not staying in communication with the employer. When he received a letter from the employer dated June 26, 2017, stating separation occurred because he had abandoned his job after several days of no call/no show, the claimant never contacted the employer. Because the claimant had discontinued contact, his repeated no call/no shows caused him to quickly incur a negative balance of attendance points.

An initial unemployment insurance decision resulting in disqualification was mailed to the claimant's last known address of record on July 12, 2017. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by July 22, 2017. Because the final day to appeal was Saturday, the deadline was extended to July 24, 2017. The appeal was not filed until August 2, 2017, which is after the date noticed on the unemployment insurance decision.

The claimant's address of record is his prior residence. The claimant stated he is currently homeless and collects his mail from his prior roommate when he is notified of mail to collect. The claimant denied receipt of the initial decision denying him benefits and stated he went to his local IWD office several weeks after the initial fact-finding interview, and learned he had been disqualified from benefits. He then filed his appeal on August 2, 2017, approximately 8 days after the final day to appeal (Department Exhibit D-1).

On October 3, 2017, the claimant was discharged from his military service. He then drove to New Jersey and is currently visiting family, and remained in New Jersey on the day of the hearing.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant's appeal is timely.

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, subsections 10 and 11, 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. Bd. 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 unemployment insurance 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. Iowa Dep't of Job Serv.*, 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. Iowa Dep't of Job Serv.*, 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. Iowa Emp't Sec. Comm'n*, 217 N.W.2d 255 (Iowa 1974); *Smith v. Iowa Emp't Sec. Comm'n*, 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 because he did not receive the initial decision. The claimant's mail is collected at his prior residence and given to him by his former roommate. The claimant did receive the initial decision and it was not until he went to his local IWD office that he learned an unfavorable decision had been rendered. He filed his appeal within a reasonable period upon notice of the unfavorable decision. Therefore, his appeal is accepted as timely filed.

The next issue is whether the claimant voluntarily quit the employment with good cause attributable to the employer.

> 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.
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> Iowa Admin. Code r. 871-24.25 provides, in pertinent part: Voluntary quit without good cause. In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer: (4) The claimant was absent for three days without giving notice to employer in violation of company rule. (35) The claimant left because of illness or injury which was not caused or aggravated by the employment or pregnancy and failed to: a. Obtain the advice of a licensed and practicing physician; b. Obtain certification of release for work from a licensed and practicing physician; c. Return to the employer and offer services upon recovery and certification for work by a licensed and practicing physician; or d. Fully recover so that the claimant could perform all of the duties of the job.

While the employer has the burden to establish the separation was a voluntary quitting of employment rather than a discharge, the claimant has the burden of proving that the voluntary leaving was for good cause attributable to the employer. Iowa Code § 96.6(2). "Good cause" for leaving employment must be that which is reasonable to the average person, not the overly sensitive individual or the claimant in particular. Uniweld Products v. Indus. Relations Comm'n, 277 So.2d 827 (Fla. Dist. Ct. App. 1973).

This case rests on the credibility of the parties. It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id*.

Administrative agencies are not bound by the technical rules of evidence. *IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 630 (Iowa 2000). A decision may be based upon evidence that would

ordinarily be deemed inadmissible under the rules of evidence, as long as the evidence is not immaterial or irrelevant. *Clark v. Iowa Dep't of Revenue*, 644 N.W.2d 310, 320 (Iowa 2002). Hearsay evidence is admissible at administrative hearings and may constitute substantial evidence. *Gaskey v. Iowa Dep't of Transp.*, 537 N.W.2d 695, 698 (Iowa 1995). Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes the employer's testimony to be more credible, and finds the weight of the evidence in the record establishes the claimant has not met his burden of proof to establish he quit for good cause reasons within Iowa law.
The court in *Reelfs v. EAB*, No. 06-1750 (Iowa App. 6/27/2007) held that absences for more than three consecutive work days without proper notification and authorization shall be presumed to be a quit without good cause. An employer is entitled to expect its employees to report to work as scheduled or to be notified when and why the employee is unable to report to work. The administrative law judge did not find the claimant's testimony credible that he was advised to discontinue reporting his absences based on the history of the employer's contact with the claimant and requests for weekly updates, and inasmuch as the employer continued to hold the claimant's position open for him.

Rather, the evidence presented supports the claimant discontinued reporting to the employer while under restriction by his treating physician and filed for unemployment the same week, while his employer held his position open. Inasmuch as the claimant failed to report for work or notify the employer for three consecutive workdays in violation of the employer policy, the claimant is considered to have voluntarily left employment without good cause attributable to the employer. Benefits are denied.

REMAND: The issue of whether the claimant is able to and available for work beginning June 4, 2017 is remanded to the Benefits Bureau of Iowa Workforce Development for an initial investigation and determination.

DECISION:

The July 12, 2017, (reference 01) decision is affirmed. The claimant filed a timely appeal. The claimant voluntarily quit the employment without good cause attributable to the employer. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. **REMAND:** The issue of whether the claimant is able to and available for work beginning June 4, 2017, is remanded to the Benefits Bureau of Iowa Workforce Development for an initial investigation and determination.

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Jennifer L. Beckman
Administrative Law Judge

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Decision Dated and Mailed

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