

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

RODOLFO CONTRERAS
Claimant

APPEAL NO: 11A-UI-13801-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

COVENANT MEDICAL CENTER INC
Employer

OC: 08-21-11
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

The claimant/appellant appealed from the October 7, 2011, reference 01, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on November 17, 2011. The claimant participated in the hearing with Attorney Michael Bandy and Interpreter Steven Rhodes, although the claimant speaks and understands English well enough that Mr. Rhodes' services were not required during the hearing. Suzanne Burt, Human Resources Director; Randy Vorland, Director of Environmental Services; Steven Rogers, Housekeeper; and Attorney Jay Heytman, participated in the hearing on behalf of the employer. Department's Exhibit D-1 was admitted to the record.

ISSUE:

The issue is whether the claimant's appeal is timely.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: A disqualification decision was mailed to the claimant's last-known address of record on October 7, 2011. The claimant received the decision. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by October 17, 2011. The appeal was not filed until October 19, 2011, which is after the date noticed on the disqualification decision. The claimant received the decision prior to the due date and recognized that it was from Iowa Workforce Development but does not read English. He does have a 13-year-old daughter who reads English but did not utilize her reading ability and ask her to read the decision to him. He did not ask anyone to translate the decision for him until he went to the Latino Resource Center around October 17, 2011. They explained the appeal was due October 17, 2011, but the claimant waited two days before seeking the services of Attorney Michael Bandy, who filed the appeal on his behalf October 19, 2011 (Employer's Exhibit D-1).

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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). The record shows that the appellant did have a reasonable opportunity to file a timely

appeal but failed to act within a reasonable period of time given the due date of the appeal. While not unsympathetic to the fact the claimant does not read English, the administrative law judge finds that knowing he cannot read English the claimant had a duty to either ask his daughter to read the representative's decision to him, go to Workforce and ask it about appealing the decision, or find someone else to translate the letter for him, as he did when he went to the Latino Resource Center. The claimant also participated in the fact-finding interview, which indicates he had someone help him read the date and time of that phone interview.

The administrative law judge concludes that failure to file a timely appeal within the time prescribed by the Iowa Employment Security Law was not due to any Agency error or misinformation or delay or other action of the United States Postal Service pursuant to 871 IAC 24.35(2). The administrative law judge further concludes that the appeal was not timely filed pursuant to Iowa Code § 96.6-2, and the administrative law judge lacks jurisdiction to make a determination with respect to the nature of the appeal. See, Beardslee v. IDJS, 276 N.W.2d 373 (Iowa 1979) and Franklin v. IDJS, 277 N.W.2d 877 (Iowa 1979).

In the alternative, if making a decision on the issue of the claimant's separation from this employer, the administrative law judge would conclude that the claimant sexually harassed a female employee of the hospital over a two and one-half month period after the female employee was hired and his conduct was witnessed, and the complainant's statements to the employer were substantiated, by at least three witnesses. Additionally, the claimant's blanket denial of all allegations was not convincing and he had been warned about similar conduct and retrained regarding sexual harassment in the past. Therefore, the employer met its burden of proving disqualifying job misconduct as that term is defined by Iowa law and benefits would have been denied regarding the merits of the separation.

DECISION:

The October 7, 2011, reference 01, decision is affirmed. The appeal in this case was not timely, and the decision of the representative remains in effect. Benefits are withheld until such time as the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/pjs