

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**CONNIE R FAULKNER**  
Claimant

**APPEAL NO. 11A-UI-03727-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**WAL-MART STORES INC**  
Employer

**OC: 01/23/11**  
**Claimant: Appellant (5)**

Iowa Code Section Iowa Code section 96.5(1) – Voluntary Quit  
See 871 IAC 24.27 – Voluntary Quit from Part-time Employment  
Iowa Code Section 96.4(3) – Able & Available  
Iowa Code Section 96.6(2) – Timeliness of Appeal

**STATEMENT OF THE CASE:**

The claimant filed an appeal from the March 3, 2011, reference 01, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call on April 15, 2011. Claimant participated. Rick Guerrero, Assistant Manager represented the employer. Department Exhibits D-1 and D-2 were received into evidence. The parties waived formal notice on the issue of whether the claimant has been able to work and available for work since she established her claim for benefits.

**ISSUES:**

Whether there is good cause to treat the claimant's late appeal as a timely appeal.

Whether the claimant separated from the employment for a reason that disqualifies her for unemployment insurance benefits.

Whether the claimant has been able to work and available for work since she established her claim for benefits.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Connie Faulkner worked for Wal-Mart as a part-time cashier for from December 8, 2010 and last performed work for the employer on December 24, 2010. Thereafter, Ms. Faulkner was off work due to illness. Ms. Faulkner was experiencing problems with her leg that eventually necessitated hospitalization. Once Ms. Faulkner started the employment, she found she could not handle the standing associated with the position. Ms. Faulkner wanted the employer to provide her with just two hours of work per shift and to provide sit-down work. The employer was not willing to provide either sit-down work or the minimal hours Ms. Faulkner wanted. On December 27, Ms. Faulkner provided the employer with a doctor's note that said she needed to

be off work for two weeks. Ms. Faulkner did not return to the employment. Ms. Faulkner's doctor(s) had not recommended that she leave the employment.

Ms. Faulkner established a claim for benefits that was effective January 23, 2011. Ms. Faulkner missed a fact-finding interview scheduled at the beginning of March 2011 because she had been admitted to the hospital. Ms. Faulkner remained in the hospital until March 21, 2011. On March 4, 2011, a Workforce Development representative entered and mailed a reference 01 decision that denied benefits based on a December 24, 2010 voluntary quit from Wal-Mart. The decision carried on its face a March 14, 2011 deadline for appeal. The decision was directed to Ms. Faulkner's last-known address of record. Ms. Faulkner did not receive the decision. Ms. Faulkner contacted Workforce Development on March 22, 2011 and learned that a representative had entered a decision denying benefits. As of April 15, 2011, Ms. Faulkner had still not received a copy of the decision denying benefits. Ms. Faulkner believes the Postal Service was holding her mail, but Ms. Faulkner was physically unable to travel to the Post Office to check on her mail. Ms. Faulkner completed an appeal form on March 25, 2011. Someone else delivered Ms. Faulkner's appeal to the Agency on March 25, 2011.

Since Ms. Faulkner established her claim for benefits, she has been unable to work. Ms. Faulkner has been unable to travel. Ms. Faulkner has to keep her left elevated and has to take medication, all to prevent blood clots from forming in her leg(s). Ms. Faulkner continues under the care of a physician and has not been released to return to work.

#### **REASONING AND CONCLUSIONS OF LAW:**

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, 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-day deadline for appeal begins to run on the date Workforce Development mails the decision to the parties. The "decision date" found in the upper right-hand portion of the Agency 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).

An appeal submitted by mail is deemed filed on the date it is mailed as shown by the postmark or in the absence of a postmark the postage meter mark of the envelope in which it was received, or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion. See 871 AC 24.35(1)(a). See also Messina v. IDJS, 341 N.W.2d 52 (Iowa 1983). An appeal submitted by any other means is deemed filed on the date it is received by the Unemployment Insurance Division of Iowa Workforce Development. See 871 IAC 24.35(1)(b).

The appeal in this case was filed on March 25, 2011 at the time the completed appeal was delivered to Workforce Development.

The evidence in the record establishes 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).

Because Ms. Faulkner did not receive the decision, the administrative law judge concludes that Ms. Faulkner did not have a reasonable opportunity to file a timely appeal because the Postal Service had not delivered the decision to her. The evidence indicates that Ms. Faulkner filed an appeal within three days of learning of the adverse decision. The weight of the evidence in the record establishes good cause to treat the late appeal as a timely appeal. See 871 IAC 24.35(2). The administrative law judge has jurisdiction to make a determination with respect to the nature of the appeal.

Iowa Code section 96.5-1-d 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. But the individual shall not be disqualified if the department finds that:

d. The individual left employment because of illness, injury or pregnancy upon the advice of a licensed and practicing physician, and upon knowledge of the necessity for absence immediately notified the employer, or the employer consented to the absence, and after recovering from the illness, injury or pregnancy, when recovery was certified by a licensed and practicing physician, the individual returned to the employer and offered

to perform services and the individual's regular work or comparable suitable work was not available, if so found by the department, provided the individual is otherwise eligible.

Workforce Development rule 817 IAC 24.26(6) provides as follows:

Separation because of illness, injury, or pregnancy.

a. Nonemployment related separation. The claimant left because of illness, injury or pregnancy upon the advice of a licensed and practicing physician. Upon recovery, when recovery was certified by a licensed and practicing physician, the claimant returned and offered to perform services to the employer, but no suitable, comparable work was available. Recovery is defined as the ability of the claimant to perform all of the duties of the previous employment.

b. Employment related separation. The claimant was compelled to leave employment because of an illness, injury, or allergy condition that was attributable to the employment. Factors and circumstances directly connected with the employment which caused or aggravated the illness, injury, allergy, or disease to the employee which made it impossible for the employee to continue in employment because of serious danger to the employee's health may be held to be an involuntary termination of employment and constitute good cause attributable to the employer. The claimant will be eligible for benefits if compelled to leave employment as a result of an injury suffered on the job. In order to be eligible under this paragraph "b" an individual must present competent evidence showing adequate health reasons to justify termination; before quitting have informed the employer of the work-related health problem and inform the employer that the individual intends to quit unless the problem is corrected or the individual is reasonably accommodated. Reasonable accommodation includes other comparable work which is not injurious to the claimant's health and for which the claimant must remain available.

The weight of the evidence establishes a voluntary quit due to a non-work-related medical condition. The weight of the evidence establishes that a medical provider advised Ms. Faulkner to take two weeks of the work, but did not advise Ms. Faulkner to quit the employment. Ms. Faulkner has not returned to the employer to offer her services after recovering from her illness and after being released to return to the employment. The voluntary quit was without good cause attributable to the employer. Accordingly, Ms. Faulkner is disqualified for benefits based on wages she earned through the Wal-Mart employment until she has worked in and been paid wages equal to ten times her weekly benefits amount after separating from Wal-Mart. Wal-Mart will not be charged for benefits.

An individual who voluntarily quits part-time employment without good cause attributable to the employer and who has not re-qualified for benefits by earning ten times her weekly benefit amount in wages for insured employment, but who nonetheless has sufficient other wage credits to be eligible for benefits may receive reduced benefits based on the other base period wages. See 871 IAC 24.27.

Wal-Mart is not a base period employer for purposes of the claim Ms. Faulkner established on January 23, 2011. Because the quit was from part-time employment, the separation would not otherwise disqualify Ms. Faulkner for benefits, and she would be eligible for benefits provided she meets all other eligibility requirements.

Iowa Code section 96.4-3 provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

871 IAC 24.22(1)a and (2) provide:

Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

(1) Able to work. An individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood.

a. Illness, injury or pregnancy. Each case is decided upon an individual basis, recognizing that various work opportunities present different physical requirements. A statement from a medical practitioner is considered prima facie evidence of the physical ability of the individual to perform the work required. A pregnant individual must meet the same criteria for determining ableness as do all other individuals.

(2) Available for work. The availability requirement is satisfied when an individual is willing, able, and ready to accept suitable work which the individual does not have good cause to refuse, that is, the individual is genuinely attached to the labor market. Since, under unemployment insurance laws, it is the availability of an individual that is required to be tested, the labor market must be described in terms of the individual. A labor market for an individual means a market for the type of service which the individual offers in the geographical area in which the individual offers the service. Market in that sense does not mean that job vacancies must exist; the purpose of unemployment insurance is to compensate for lack of job vacancies. It means only that the type of services which an individual is offering is generally performed in the geographical area in which the individual is offering the services.

The weight of the evidence in the record establishes that Ms. Faulkner has not been able to work or available for work since she established her claim for benefits. The weight of the evidence establishes that since she filed her claim, Ms. Faulkner has suffered from a debilitating medical condition that prevents her from walking, prevents her from standing, prevents her from driving, and prevents her from performing work. Ms. Faulkner has an unreasonable assessment of her work ability. Ms. Faulkner continues under the care of a physician for the debilitating, potentially life-threatening medical condition and has not been released to return to work. For these reasons, Ms. Faulkner cannot be deemed able and available for work and has not been eligible for benefits since she established her claim. Benefits are denied effective

January 23, 2011. This disqualification continued as of the April 15, 2011 appeal hearing. Ms. Faulkner will continue to be ineligible for benefits unless and until she provides proof that she has been released by a physician to perform work.

**DECISION:**

The appeal was timely. The Agency representative's March 3, 2011, reference 01, decision is modified as follows. The claimant voluntarily quit part-time employment without good cause attributable to the employer. The claimant is ineligible for benefits based on the Wal-Mart employment until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount. Wal-Mart's account will not be charged. Because the quit was from part-time employment, the separation would not otherwise disqualify the claimant for benefits, and she would be eligible for benefits provided she meets all other eligibility requirements.

The claimant has not been able and available for work since she established her claim. Benefits are denied effective January 23, 2011. This disqualification continued as of the April 15, 2011 appeal hearing. The claimant will continue to be ineligible for benefits unless and until she provides proof that she has been released by a physician to perform work.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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