IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

ISAAC MARTINEZ
Claimant

ADVANCE SERVICES INC
Employer

APPEAL NO. 14A-UI-09033-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 02/23/14
Claimant: Respondent (4)

Iowa Code Section 96.4(3) – Able & Available
Iowa Code Section 96.5(1)(j) – Separation From Temporary Employment
Iowa Code Section 96.6(2) – Timeliness of Appeal

STATEMENT OF THE CASE:

The employer filed an appeal that is, on the surface, a late appeal from the April 8, 2014, reference 01, decision that allowed benefits to the claimant effective February 23, 2014, based on an agency conclusion that the claimant was job-attached, available for work, and had been subject to a short-term layoff. However, the employer actually filed the appeal in the hope of addressing a separation for which Iowa Workforce Development had previously deferred adjudication. After due notice was issued to both parties, a hearing was held on September 16, 2014. Claimant Isaac Martinez did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Michael Payne represented the employer. Exhibits One through Eight and Department Exhibits D-1 and D-2 were received into evidence.

ISSUES:

Whether there was an employment separation on January 10, 2014. If so, whether Workforce Development has ever adjudicated the eligibility and liability issues attending the separation. If there was a separation on January 10, 2014, whether the separation was for a reason that disqualifies the claimant for benefits or that relieves the employer of liability for benefits.

Whether the employer's late appeal from the April 8, 2014, reference 01, decision was a timely appeal.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Advance Services, Inc., ASI, is a temporary employment agency. Claimant Isaac Martinez began a full-time temporary work assignment through ASI at Pella Corporation on August 1, 2013 and completed that assignment on January 10, 2014. In mid-December 2013, Pella Corporation had notified Mr. Martinez and other temporary workers that the company could be shut down for the Christmas holiday and would be ending temporary work assignments during the first or second week of the new year.

In August 2013, the employer had Mr. Martinez sign an Advance Services, Inc. End of Assignment Policy. The policy stated as follows:

> I understand that it is my responsibility to contact Advance Services, Inc. within three working days after my assignment ends to request further assignment or I will be considered to have voluntarily quit. Failure to do so could affect my eligibility for unemployment insurance benefits.

The policy appeared on the same document as one other policy. The employer provided Mr. Martinez with a copy of the policy. Mr. Martinez acknowledged receipt of a copy of the policy at the time he signed it.

After Mr. Martinez completed his work assignment at Pella Corporation on January 10, 2014, he did not make further contact with ASI until February 28, 2014. Mr. Martinez contacted ASI on February 28, 2014, because he had heard that Pella Corporation was bringing temporary workers back. Mr. Martinez accepted a new assignment at Pella Corporation that started on March 17, 2014.

Claimant Isaac Martinez established a claim for unemployment insurance benefits that was effective February 23, 2014. No benefits were paid on the claim until April 7, 2014, at which time Workforce Development paid Mr. Martinez $1,062.00 for the three-week period of February 23, 2014 through March 15, 2014.

On March 3, 2014, Iowa Workforce Development mailed a notice of claim to the employer. The notice of claim set forth a March 13, 2014 deadline for the employer's protest. On March 5, 2014, the employer filed its protest. The employer noted on the notice of claim/protest that the claimant had voluntarily quit without good cause attributable to the employer on January 10, 2013. The employer erroneously set forth the year of the separation as 2013. The correct separation year was 2014.

On March 13, 2014, Iowa Workforce Development mailed a letter to the employer. The letter acknowledged receipt of the employer's protest. The letter advised the employer that Workforce Development was not going to take any action on the protest because the claimant lacked sufficient earnings to be monetarily eligible for benefits. The letter advised the employer that in the event the claimant filed a subsequent claim, and if the employer was an employer of record on the claim, then and only then would Workforce Development adjudicate the separation issue that the employer had raised in its March 5, 2014 protest. The agency has never returned to adjudicate the employment separation issue.

On March 21, 2014, Iowa Workforce Development mailed a new notice of claim to the employer. It is noteworthy that the new notice of claim was mailed to the employer after Mr. Martinez had started the new assignment at Pella Corporation. The March 21, 2014, notice of claim provided a March 31, 2014 deadline for the employer's response. On March 24, 2014, the employer filed a protest. The employer noted on the notice of claim form that Mr. Martinez was still employed full time.

On April 7, 2014, the employer participated in a fact-finding interview, the purpose of which was to discuss whether the claimant had been able and available for work since he had established the claim for benefits that was effective February 25, 2014. At the fact-finding interview, the employer advised the claims deputy Mr. Martinez had just started a full-time work assignment and that the employer was not sure why the claimant was filing for unemployment insurance benefits. The claims deputy followed up the fact-finding interview with the April 8, 2014, reference 01, decision that allowed benefits to the claimant effective February 23, 2014, based on an agency conclusion that the claimant was job-attached, available for work, and had been subject to a short-term layoff. The decision cited Iowa Code section 96.4(3), regarding the able

and available requirement, as the basis for the decision. The decision did not directly address the employer's assertion, in the March 5, 2014, protest, that the claimant had voluntarily quit the employment. The decision made no reference to the employer's account being liable for benefits paid to the claimant. The claims deputy also released $1,062.00 in benefits to Mr. Martinez for the three-week period of February 23, 2014 through March 15, 2014.

The April 8, 2014, reference 01, decision contained a warning that an appeal from the decision must be postmarked by April 18, 2014, or received by the Appeals Section by that date. The employer received the decision in a timely manner, prior to the deadline for appeal, but did not file an appeal from the decision by the April 18, 2014 deadline. The employer had concluded that it did not need to file an appeal from the decision that addressed only whether the claimant had been *available* for work since he established his claim for benefits. The employer took no further action on the matter until the employer received the quarterly statement of charges that was mailed to the employer on August 8, 2014. The statement of charges included a charge to the employer's account for benefits paid to Mr. Martinez.

On September 2, 2014, the employer contacted the Workforce Development Tax Bureau to contest the charge to the employer's account. The employer attempted to explain to the Tax Bureau the employer's position that the separation issue that the employer had raised in response to the March 3, 2014 notice of claim had never been addressed. The Tax Bureau responded on September 2, 2014 and indicated at that time that the employer was bound by the April 8, 2014, reference 01, decision and that the employer's only recourse was to challenge that decision. The employer concluded that the agency had not understood the separation issue the employer was attempting to address. The employer followed the Tax Bureau's directive and on September 2, 2014, filed a late appeal from the April 8, 2014, reference 01, decision.

REASONING AND CONCLUSIONS OF LAW:

The administrative law judge will first address the employer's late appeal from the April 8, 2014, reference 01, decision.

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 § 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to § 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 § 96.5, subsection 10, and has the burden of proving that a voluntary quit pursuant to § 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving § 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 § 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 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). The record shows that the appellant did have a reasonable opportunity to file a timely appeal from the April 8, 2014, reference 01, decision, but elected not to file an appeal from decision.

The administrative law judge concludes that employer's 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. See 871 IAC 24.35(2). The administrative law judge further concludes that the appeal was not timely filed pursuant to Iowa Code section 96.6(2), and the administrative law judge lacks jurisdiction to make a determination with respect to the nature of the appeal *as it relates to the availability issue*. See, Beardslee v. IDJS, 276 N.W.2d 373 (Iowa 1979) and Franklin v. IDJS, 277 N.W.2d 877 (Iowa 1979).

The conclusion that the employer's appeal from the April 8, 2014, reference 01, decision concerning the claimant's *availability* for work does not preclude the employer from seeking adjudication of the separation issue for which Workforce Development previously deferred adjudication. The employer filed a timely protest concerning that issue. Though the Benefits Bureau never returned to the issue after deferring adjudication, though there was reason to return to the issue in March 2014. Both parties had appropriate notice that the issue related to the separation from the employment would be addressed as part of the appeal hearing set for September 16, 2014. The administrative law judge concludes that he has jurisdiction to rule on the merits of the appeal as it relates to the January 10, 2014 separation, the claimant's eligibility for benefits in connection with that separation, the employer liability for benefits in connection with that separation, and the associated overpayment issue.

Iowa Code section 96.5-1-j 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:
>
> j. The individual is a temporary employee of a temporary employment firm who notifies the temporary employment firm of completion of an employment assignment and who seeks reassignment. Failure of the individual to notify the temporary employment firm of completion of an employment assignment within three working days of the completion of each employment assignment under a contract of hire shall be deemed a voluntary quit unless the individual was not advised in writing of the duty to notify the temporary employment firm upon completion of an employment assignment or the individual had good cause for not contacting the temporary employment firm within three working days and notified the firm at the first reasonable opportunity thereafter.
>
> To show that the employee was advised in writing of the notification requirement of this paragraph, the temporary employment firm shall advise the temporary employee by requiring the temporary employee, at the time of employment with the temporary employment firm, to read and sign a document that provides a clear and concise explanation of the notification requirement and the consequences of a failure to notify. The document shall be separate from any contract of employment and a copy of the signed document shall be provided to the temporary employee.
>
> For the purposes of this paragraph:
>
> (1) "Temporary employee" means an individual who is employed by a temporary employment firm to provide services to clients to supplement their work force during absences, seasonal workloads, temporary skill or labor market shortages, and for special assignments and projects.
>
> (2) "Temporary employment firm" means a person engaged in the business of employing temporary employees.

Iowa Admin. Code r. 871-24.26(19) provides:

> Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:
>
> (19) The claimant was employed on a temporary basis for assignment to spot jobs or casual labor work and fulfilled the contract of hire when each of the jobs was completed. An election not to report for a new assignment to work shall not be construed as a voluntary leaving of employment. The issue of a refusal of an offer of suitable work shall be adjudicated when an offer of work is made by the former employer. The provisions of Iowa Code section 96.5(3) and rule 24.24(96) are controlling in the determination of suitability of work. However, this subrule shall not apply to substitute school employees who are subject to the provisions of Iowa Code section 96.4(5) which denies benefits that are based on service in an educational institution when the individual declines or refuses to accept a new contract or reasonable assurance of continued employment status. Under this circumstance, the substitute school employee shall be considered to have voluntarily quit employment.

The evidence in the record indicates Mr. Martinez had been provided with proper notice of his obligation to contact the employer within three working days of the end of an assignment to request placement in an additional assignment. Mr. Martinez did not make the required contact. There was indeed a separation from the assignment, and from the employment, that occurred on January 10, 2014. The separation was without good cause attributable to the employer. Effective January 10, 2014, the claimant is disqualified for benefits in connection with the separation. The claimant was disqualified until he had worked in and been paid wages equal to ten times his weekly benefit amount.

The unemployment insurance law requires that benefits be recovered from a claimant who receives benefits and is later deemed ineligible benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code section 96.3-7-a, -b.

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid $1,062.00 in benefits issued to Mr. Martinez for the three-week period of February 23, 2014 through March 15, 2014. Because a fact-finding interview was never scheduled to address the January 10, 2014 separation, the employer cannot be deemed to have failed to participate in such fact-finding interview. The claimant is required to repay the overpayment and the employer will not be charged for benefits already paid to the claimant.

DECISION:

The claims deputy's April 8, 2014, reference 01, decision regarding the claimant's availability shall remain in effect, based on the employer's failure to file a timely appeal from that decision.

However, that decision is effective modified as follows. The claimant is disqualified for benefits based on the January 10, 2014, separation without good cause attributable to the employer. Effective January 10, 2014, the claimant was disqualified for benefits until he had worked in and been paid wages equal to 10 times his weekly benefit amount. The claimant is overpaid $1,062.00 in benefits issued to Mr. Martinez for the three-week period of February 23, 2014 through March 15, 2014. The claimant is required to repay the overpayment and the employer will not be charged for benefits already paid to the claimant.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

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