

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

BRET A WITTMAYER JR
1119 UPTON AVE
WATERLOO IA 50701-1945

ALL AMERICAN TURF BEAUTY INC
PO BOX 260
VAN METER IA 50261-0260

Appeal Number: 06A-UI-02794-R
OC: 01/29/06 R: 03
Claimant: Appellant (2-R)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-1 – Voluntary Quitting
Section 96.5-2-a – Discharge for Misconduct
Section 96.6-2 – Initial Determination (Timeliness of Appeal)

STATEMENT OF THE CASE:

The claimant, Bret A. Wittmayer, Jr., filed an appeal from an unemployment insurance decision dated February 20, 2006, reference 01, denying unemployment insurance benefits to him. After due notice was issued, an in-person hearing was held in Des Moines, Iowa, at the claimant's request, on March 29, 2006, with the claimant participating. Assisting the claimant because of the claimant's speech impediment and testifying on behalf of the claimant was his mother, Kathy Miller. The employer, All American Turf Beauty, Inc., did not participate in the hearing because the employer did not appear for the unemployment insurance in-person hearing. Department Exhibit One was admitted into evidence. The administrative law judge

takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant. Although not set out on the notice of appeal, the administrative law judge nevertheless took evidence on and decided the issue as to whether the claimant's appeal was timely or, in the alternative, whether the claimant demonstrated good cause for delay in the filing of his appeal, under Iowa Code section 96.6(2), because that issue was jurisdictional and went to the authority of the administrative law judge to decide other issues that were set out on the notice of appeal.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Department Exhibit One, the administrative law judge finds: An unemployment insurance decision dated February 20, 2006, reference 01, determined that the claimant was not eligible to receive unemployment insurance benefits because records indicate that he voluntarily quit work on January 20, 2006 and his quitting was not caused by his employer. That decision was sent to the claimant on February 20, 2006 at the same address as shown on the return address on the envelope bearing claimant's appeal. The claimant received the decision sometime in the last week of February. That decision indicated that an appeal had to be postmarked or otherwise received by the Appeals Section by March 2, 2006. However, as shown at Department Exhibit One which is the claimant's appeal and the envelope bearing the appeal, the claimant's appeal was postmarked on March 3, 2006, making the appeal appear to be one day late. However, the claimant observed on the decision the deadline for the appeal and prepared the appeal on March 2, 2006 and deposited the same in a U. S. Postal Service depository on March 2, 2006. The claimant believed that by depositing the letter in the depository on March 2, 2006, the letter would be postmarked on that date. However, the U. S. Postal Service did not postmark the envelope until the next day, March 3, 2006.

Because the administrative law judge hereinafter concludes that the claimant's appeal was not late or, in the alternative, that the claimant has demonstrated good cause for delay in the filing of his appeal, the administrative law judge further finds: The claimant was employed by the employer as a full-time general utility and crew leader from September of 2003 until he was laid off for a lack of work on January 20, 2006. Because of the nature of the claimant's work there is a two or three month period beginning approximately three weeks after the beginning of the new year when there is little work for the claimant to do. Prior to his separation the claimant had made arrangements with the employer to continue working during this slow period but part-time in order to allow the claimant to return to school. When the employer approved this arrangement the claimant then made arrangements to go back to school full-time. However, on January 20, 2006, the claimant was informed that there was no work for him to do and that he should file for unemployment insurance benefits. The claimant would not have enrolled in school without the employer's permission to do so and a promise to continue with part-time work.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant filed a timely appeal of the decision dated February 20, 2006, reference 01, or, if not, whether the claimant demonstrated good cause for such failure. The administrative law judge concludes that the claimant's appeal was timely and, in the alternative,

the claimant has demonstrated good cause for the delay in the filing of his appeal and the claimant's appeal should be accepted and the administrative law judge has jurisdiction to reach the remaining issue.

2. Whether the claimant's separation from employment was a disqualifying event. It was not.

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.

871 IAC 24.35(1) & (2) provide:

(1) Except as otherwise provided by statute or by department rule, any payment, appeal, application, request, notice, objection, petition, report or other information or document submitted to the department shall be considered received by and filed with the department:

a. If transmitted via the United States postal service or its successor, 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 is 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.

b. If transmitted by any means other than the United States postal service or its successor, on the date it is received by the department.

(2) The submission of any payment, appeal, application, request, notice, objection, petition, report or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the department that the delay in submission was due to department error or misinformation or to delay or other action of the United States postal service or its successor.

a. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.

b. The department shall designate personnel who are to decide whether an extension of time shall be granted.

c. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the department after considering the circumstances in the case.

d. If submission is not considered timely, although the interested party contends that the delay was due to department error or misinformation or delay or other action of the United States postal service or its successor, the department shall issue an appealable decision to the interested party.

The administrative law judge concludes that the claimant has the burden to prove that his appeal was timely or that he had good cause for the delay in the filing of his appeal. The administrative law judge concludes that the claimant has met his burden of proof to demonstrate by a preponderance of the evidence that his appeal was timely, or, in the alternative, that he had good cause for the delay in the filing of his appeal. The claimant credibly testified that he received the decision from which he now seeks to appeal in a timely fashion. The claimant further credibly testified that he prepared his appeal and mailed the same on March 2, 2006, the deadline for the appeal, by depositing it in a depository of the U. S. Postal Service. The claimant further credibly testified that he believed that by doing so the appeal would be postmarked on that day. However, the claimant's appeal was not postmarked until the day after, March 3, 2006, making the appeal appear to be one day late. The administrative law judge concludes that the claimant properly mailed his appeal within the time period and therefore, the claimant's appeal is timely. Even if the claimant's appeal should be considered not timely, being one day late according to the actual postmark on the envelope bearing the claimant's appeal, the administrative law judge would conclude that any such delay in the filing of the claimant's appeal was due to the delay or other action by the U. S. Postal Service. Accordingly, the administrative law judge concludes that the claimant's appeal was not timely, and in the alternative, the claimant has demonstrated good cause for the delay in the filing of his appeal and, therefore, the claimant's appeal should be accepted and the administrative law judge has jurisdiction to reach the remaining issue.

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.

Iowa Code section 96.5-2-a provides:

An individual shall be disqualified for benefits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:

a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

871 IAC 24.32(1)a provides:

Discharge for misconduct.

(1) Definition.

a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The claimant credibly testified, and the administrative law judge concludes, that he was essentially laid off for a lack of work on January 20, 2006. The claimant credibly testified that there is a two or three month period in his employment that begins approximately three weeks after the new year when there is little work. The claimant testified credibly that he had made arrangements with the employer to work at least part-time during this period and would then enroll in school. The employer approved this arrangement and the claimant enrolled in school believing that he was going to have part-time work available to him. However, on January 20, 2006, the claimant was informed that there was no work for him and that he should file for unemployment insurance benefits. Accordingly, the administrative law judge concludes that the claimant was laid off for a lack of work and this is not disqualifying. The claimant credibly denied leaving his employment voluntarily and his statement appearing to be to that effect at fact finding was caused by the claimant's speech impediment. Assuming that the claimant had been discharged, the employer did not participate in the hearing to provide evidence that the claimant was discharged for any acts of disqualifying misconduct. Accordingly, the administrative law judge concludes that the claimant was laid off for a lack of work on

January 20, 2006 and, as a consequence, he is not disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided he is otherwise eligible.

In order to determine whether the claimant is otherwise eligible to receive unemployment insurance benefits, this matter must be remanded to Claims for an investigation and determination as to whether the claimant is ineligible to receive unemployment insurance benefits because, at relevant times, he is, and was, not available for work, pursuant to Iowa Code section 96.4(3). This issue was not set out on the notice of appeal and the administrative law judge does not now have jurisdiction to decide this issue. However, the evidence indicates that the claimant is enrolled as a full-time student in a community college and this raises the issue as to his availability for work. The claimant testified that he was earnestly and actively seeking work and was able to work.

DECISION:

The representative's decision of February 20, 2006, reference 01, is reversed. The claimant, Bret A. Wittmayer, Jr., is entitled to receive unemployment insurance benefits, provided he is otherwise eligible, because he was laid off for a lack of work on January 20, 2006. The claimant's appeal was timely, or, in the alternative, the claimant has demonstrated good cause for the delay in the filing of his appeal. In order to determine whether the claimant is otherwise eligible to receive unemployment insurance benefits, this matter must be remanded to Claims for an investigation and determination as to whether the claimant is ineligible to receive unemployment insurance benefits because, at relevant times, he is, and was, not available for work pursuant to Iowa Code section 96.4(3).

REMAND:

This matter is remanded to Claims for an investigation and determination as to whether the claimant is ineligible to receive unemployment insurance benefits because, at relevant times, he is, and was, not available for work under Iowa Code section 96.4(3) because of his attendance at school.

cs/tjc