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

JEFFREY S CHAMPION
1621 S CENTRAL AVE
BURLINGTON IA 52601

WAL-MART STORES INC
C/O TALX UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 05A-UI-11551-RT
OC: 09/25/05 R: 04
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant, Jeffrey S. Champion, filed an appeal from an unemployment insurance decision dated October 13, 2005, reference 01, denying unemployment insurance benefits to him. After due notice was issued, a telephone hearing was held on November 30, 2005, with the claimant participating. The employer, Wal-Mart Stores, Inc., did not participate in the hearing because the employer did not call in a telephone number, either before the hearing or during the hearing, where any witnesses could be reached for the hearing, as instructed in the notice of appeal. The employer is represented by Talx UC Express, which is well aware of the need to call in a telephone number in advance of the hearing if the employer wants to participate in the hearing. In addition to the notice, which was sent to the parties on November 14, 2005, the appeals section sent a copy of documents, submitted by the claimant, to the employer on November 18,

2005. The employer here received two different mailings indicating that there was an appeal hearing but nevertheless did not call in telephone numbers for any witnesses. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant. Department Exhibit 1 and Claimant's Exhibit A were admitted into evidence.

FINDINGS OF FACT:

Having heard the testimony of the witness and having examined all of the evidence in the record, including Department Exhibit 1 and Claimant's Exhibit A, the administrative law judge finds: An authorized representative of Iowa Workforce Development issued a decision in this matter on October 13, 2005, reference 01, determining that the claimant was not eligible to receive unemployment insurance benefits because unemployment insurance records indicate that he was discharged from work on September 28, 2005 for violation of a known company rule. This decision was sent to the parties on the same day. This decision indicated that an appeal had to be postmarked or otherwise received by the appeals section by October 24, 2005 (the decision actually read October 23, 2005 but since that was a Sunday, the appeal would be due the next business or working day). The claimant left his appeal at his local workforce development office on October 18, 2005 as shown at Department Exhibit 1. The claimant's appeal was timely. The local Iowa Workforce Development office faxed the appeal on October 18, 2005 but it was never received by the appeals section. It appears that the local workforce development office faxed the appeal to the wrong fax number. The administrative law judge then received a message on November 9, 2005 from the local workforce development office stating that the appeal had been faxed on October 18, 2005 and was asking for the status. The local workforce development office was informed that the appeals section did not receive the appeal. It was faxed a second time on November 10, 2005 as shown at Department Exhibit 1. This was received by the appeals section on November 10, 2005. The local workforce office then sent the original appeal, which was received by the appeals section on November 14, 2005 also as shown at Department Exhibit 1.

Because the administrative law judge hereinafter and after concludes the claimant's appeal was timely and, even if not, 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, most recently as an unloader for seven and a half years, from October of 1996 until he was discharged on September 28, 2005. the claimant was discharged for allegedly violating a safety policy of the employer when the claimant called in a trailer to a door to be loaded or unloaded when the trailer had already been called to a different door. The function of calling trailers to a door is usually performed by managers and it is not part of the claimant's usual duties. However, when a manager is unavailable the claimant is asked to help out and does so. A computer terminal shows which trailers are at what doors. On September 21, 2005, the claimant called a trailer to a door but learned shortly thereafter that the trailer was already at a different door and had already been called in. This was on the computer but the claimant simply did not see it. At the time, the claimant was not aware that this was a safety violation since there were no rules specifically setting out this situation as a safety violation. Apparently, the employer was not aware that it was a safety violation because the claimant was not discharged until September 28, 2005, because the employer had to determine if this was a safety violation. The claimant was informed on September 26, 2005, that the employer determined that his actions were a safety violation and then the claimant was discharged on September 28, 2005. The claimant knew that it was improper to call in a trailer to a door when the trailer had already been called in, but did not intentionally do so on September 21, 2005. The claimant had never been accused of this behavior before nor had he ever received any

specific relevant warnings or disciplines for such behavior. The claimant had been given a general warning when he first started calling in trailers that he had to be careful.

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 October 13, 2005, reference 01 and, if not, whether the claimant can demonstrate good cause for delay in the filing of his appeal. The administrative law judge concludes that the claimant's appeal was timely and, even if not timely, the claimant has demonstrated good cause for a delay in the filing of the appeal and therefore the 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.

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 not have a reasonable opportunity to file a timely appeal.

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 and, even if not timely, he had good cause for the delay in the filing of his appeal. The claimant appealed the decision on October 18, 2005 by leaving a copy of his appeal on that date with the local workforce development office as shown at Department Exhibit 1. It was faxed on October 18, 2005 by the local workforce development office, but never received by the appeals section. Apparently the appeal was faxed to the wrong fax number. The local workforce development office inquired to the appeals section on November 9, 2005, about the status of the appeal and learned that the appeal had never been received. The local workforce development office then faxed the appeal a second time on November 10, 2005, which was received by the appeals section on November 10, 2005. The local workforce development office then sent the original appeal, which was received by the appeals section on November 14, 2005. The administrative law judge concludes that by completing the appeal and leaving it at the workforce development office on October 18, 2005, expecting the local workforce development office to fax it on that day, it was an appeal of the decision and the appeal was timely. Even if the appeal was not timely, the delay in the filing of the appeal was due to error or misinformation on the part of Iowa Workforce Development either when the local workforce development office faxed it to the wrong fax number or it was not received appropriately by the appeals section. Accordingly, the administrative law judge concludes that the claimant's attempted appeal of the decision dated October 14, 2005, reference 01, is timely and even if not timely, the claimant has demonstrated good cause for the delay in the filing of his appeal. Therefore, the administrative law judge concludes that the claimant's appeal should be accepted and that he has jurisdiction to reach the remaining issue.

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 the claimant was discharged on September 28, 2005. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. It is well established that the employer has the burden to prove disqualifying misconduct. See Iowa Code section 96.6(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. The administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The employer did not participate in the hearing and provide sufficient evidence of deliberate acts or omissions on the part of the claimant constituting a material breach of his duties and/or evincing a willful and wanton disregard of the employer's interest and/or in carelessness or negligence of such a degree of recurrence, all as to establish disqualifying misconduct.

The claimant credibly testified that he was discharged for calling in a trailer to a door when the trailer had already been called in to a different door. This is the first time the claimant had done so. The claimant knew it was improper but did not know it was a safety violation. The computer did show that the trailer had been called in to another door but the claimant simply did not catch it. The claimant had never been accused of this behavior before nor had he ever received any specific relevant warnings or disciplines but he had received a general warning when he first started doing this seven years ago to be careful. The claimant credibly testified that it was not usually his job function to call in trailers but only did so when the manager was not available and he was simply helping out a manager. On the evidence here, the administrative law judge is constrained to conclude that the claimant's act in calling in a trailer when it had already been called in was really simply an isolated instance of negligence when he did not notice on the computer that the trailer had already been called in. Ordinary negligence in an isolated instance is not disqualifying misconduct. The administrative law judge specifically notes and reiterates that the claimant had never been accused of such behavior before, and never received any specific relevant warnings for such violations before, and was not aware that his actions were a specific safety violation. The administrative law judge also specifically notes that the employer did not know if it was a safety violation either because the claimant's act occurred on September 21, 2005, but he was not even informed that is was a safety violation until September 26, 2005, and then not discharged until September 28, 2005, because the employer had to determine if it was a safety violation.

In summary, and for all the reasons set out above, the administrative law judge concludes that the claimant was discharged but not for disqualifying misconduct and, as a consequence, he is

not disqualified to receive unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits and misconduct to support a disqualification from unemployment insurance benefits must be substantial in nature. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes that there is insufficient evidence here of substantial misconduct on the part of the claimant to warrant his disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant provided he is otherwise eligible.

DECISION:

The representative's decision of October 13, 2005, reference 01, is reversed. The claimant, Jeffrey S. Champion, is entitled to receive unemployment insurance benefits provided he is otherwise eligible, because he was discharged but not for disqualifying misconduct. The claimant's appeal was timely and, even if not timely, the claimant has demonstrated good cause for a delay in the filing of his appeal and the appeal is, therefore, accepted.

dj/tjc