

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**CHARLES A GREENE**  
Claimant

**APPEAL NO. 09A-UI-02929-DT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**CARSTENS TRUCKING LLC**  
Employer

**Original Claim: 05/18/08  
Claimant: Appellant (2)**

Section 96.5-2-a – Discharge  
Section 96.6-2 – Timeliness of Appeal  
Section 96.7-2-a(2) – Charges Against Employer’s Account

**STATEMENT OF THE CASE:**

Charles A. Greene (claimant) appealed a representative’s January 27, 2009 decision (reference 03) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment with Carstens Trucking, L.L.C. (employer). After hearing notices were mailed to the parties’ last-known addresses of record, a telephone hearing was held on March 19, 2009. This appeal was consolidated for hearing with one related appeal, 09A-UI-02930-DT. The claimant participated in the hearing. Kyle Carstens appeared on the employer’s behalf. During the hearing, Exhibit A-1 was entered into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

**ISSUES:**

Was the claimant’s appeal timely?

Was the claimant discharged for work-connected misconduct?

Is the employer’s account subject to charge?

**FINDINGS OF FACT:**

The representative’s decision was mailed to the claimant’s last known address of record on January 27, 2009. The claimant did not receive the decision. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by February 6, 2009. The appeal was not filed until February 23, 2009, which is after the date noticed on the disqualification decision. The claimant filed his appeal at that time after learning of the disqualification decision upon inquiry to a local Agency office after he received a resulting overpayment decision.

After an apparent prior period of employment with the employer<sup>1</sup>, the claimant most recently started working for the employer on September 18, 2008. He worked full time as a driver in the employer's local and regional bulk and agricultural commodity trucking business. His last day of work was November 11, 2008. The employer discharged him on November 14, 2008. The reason asserted for the discharge was having an accident causing significant damage on November 11 after recent prior unsatisfactory job performance issues.

On November 5, the claimant dumped an animal feed product in a wrong spot so that it did get to a fence area the employer had warned the claimant to stay away from. On November 10, the claimant's brakes on a set of the truck's wheels locked and he did not notice for about a half to three-quarters of a mile, causing damage to the pair of tires. The employer was not pleased, but did not advise the claimant that his job was in jeopardy.

On November 11, the claimant was on a highway exit ramp when he pulled partially onto the shoulder, thinking to get out and relieve himself. He then noticed a gas station a short distance away, and started to pull back onto the highway and make the turn. However, the soft shoulder did not allow him to pull back onto the highway and as he had started to make his turn, he was pulled into the nearby ditch and rolled the truck. He was given a traffic citation for failure to maintain control. The employer's insurance company subsequently informed the employer that it would no longer cover the claimant. As a result of the accumulation of these incidents in a short time, capped by the roll over on November 11, the employer discharged the claimant.

The claimant established an unemployment insurance benefit year effective May 18, 2008. He filed an additional claim effective November 16, 2008.

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

The preliminary issue in this case is whether the claimant timely appealed the representative's decision. Iowa Code § 96.6-2 provides that unless the affected party (here, the claimant) files an appeal from the decision within ten calendar days, the decision is final and benefits shall be paid or denied as set out by the decision.

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 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

---

<sup>1</sup> The administrative law judge takes official notice of a representative's decision issued June 9, 2008 (reference 02), which concluded there had been an August 3, 2007 separation but that the claimant was still eligible to receive unemployment insurance benefits in conjunction with that separation, but the employer's account was not subject to charge for benefits paid based upon the wages paid to the claimant in that employment.

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.

The administrative law judge concludes that failure to file a timely appeal within the time prescribed by the Iowa Employment Security Law was due to Agency error or misinformation or delay or other action of the United States Postal Service pursuant to 871 IAC 24.35(2), or other factor outside of the claimant's control. The administrative law judge further concludes that the appeal should be treated as timely filed pursuant to Iowa Code § 96.6-2. Therefore, the administrative law judge has jurisdiction to make a determination with respect to the nature of the appeal. See Beardslee, supra; Franklin, supra; and Pepsi-Cola Bottling Company v. Employment Appeal Board, 465 N.W.2d 674 (Iowa App. 1990).

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate matters. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

In order to establish misconduct such as to disqualify a former employee from benefits, an employer must establish the employee was responsible for a deliberate act or omission that was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445 (Iowa 1979); Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior that 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. 871 IAC 24.32(1)a; Huntoon, supra; Henry, supra. In contrast, 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. 871 IAC 24.32(1)a; Huntoon, supra; Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

The reason cited by the employer for discharging the claimant is the unsatisfactory job performance in early November culminating in the November 11 roll over. The mere fact that an employee might have various incidents of unsatisfactory job performance does not establish the necessary element of intent; misconduct connotes volition. A failure in job performance is not misconduct unless it is intentional. Huntoon, supra; Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). There is no evidence the claimant intentionally failed to perform

his duties to the best of his abilities or acted with reckless abandon. Under the circumstances of this case, the claimant's unsatisfactory job performance was the result of inefficiency, unsatisfactory conduct, inadvertence, or ordinary negligence, or was a good-faith error in judgment or discretion. The employer has not met its burden to show disqualifying misconduct. Cosper, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

The final issue is whether the employer's account is subject to charge. An employer's account is only chargeable if the employer is a base period employer. Iowa Code § 96.7. The base period is "the period beginning with the first day of the five completed calendar quarters immediately preceding the first day of an individual's benefit year and ending with the last day of the next to the last completed calendar quarter immediately preceding the date on which the individual filed a valid claim." Iowa Code § 96.19-3. The claimant's base period began January 1, 2007 and ended December 31, 2007. The employer did employ the claimant during this time for his prior period of employment, but the employer has already been determined to be exempt from charge for benefits paid based on those wages; the claimant's more recent period of employment with the employer is not within his current base period. Therefore the employer is treated as a non-base period employer and its account is not currently chargeable for benefits paid to the claimant.

**DECISION:**

The representative's January 27, 2009 decision (reference 03) is reversed. The appeal in this case is treated as timely. The employer did discharge the claimant, but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible. The employer's account is not subject to charge in the current benefit year.

---

Lynette A. F. Donner  
Administrative Law Judge

---

Decision Dated and Mailed

ld/kjw