

**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**

**FLOYD D RUSH
336 – 17TH AVE S
CLINTON IA 52733**

**ECONOMY COATING SYSTEMS INC
PO BOX 20
CAMANCHE IA 52730-0020**

**Appeal Number: 04A-UI-09503-DWT
OC: 07/25/04 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 are 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
Section 96.6-2 – Timeliness of Appeal

STATEMENT OF THE CASE:

Floyd D. Rush (claimant) appealed a representative's August 19, 2004 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits, and the account of Economy Coating Systems, Inc. (employer) would not be charged because the claimant had been discharged for disqualifying reasons. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on September 21, 2004. The claimant responded to the hearing notice and provided a phone number at which to contact him. The claimant did not answer his phone and a message was left on his answering machine to contact the Appeals Section immediately. The claimant did not contact the Appeals Section again. Robin Genco-Marducci, the controller, appeared on the employer's behalf. 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:

Did the claimant file a timely appeal or establish a legal excuse for filing a late appeal?

Did the employer discharge the claimant for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer again in September 2002. He worked full time as a concrete finisher. The claimant received a copy of the employer's drug policy, which informs employees they will be discharged if they test positive for an illegal substance. The policy also informs employees they must submit to a drug test if they are involved in a work-related accident.

On February 8, 2004, the claimant was working alone when he felt a strain in his back. The next day the claimant called in sick. On February 20, 2004, the claimant went to his doctor. On February 25, 2004, the claimant called the employer and informed the employer his doctor wanted to do an MRI on him because he had hurt his back at work. The employer then filed a first report of injury and scheduled an appointment for the claimant with one of the doctors the employer refers employees to for work-related injuries.

The claimant went to the employer's doctor on March 4, 2004. The employer had the claimant submit to a post-injury drug test. The test came back positive for an illegal drug. Personnel from the certified lab that performed the test contacted the claimant about the results of the test. The claimant received a certified letter from the employer advising him that he had a right to have a split sample tested and the cost of the test. The claimant did not have the split sample tested.

The employer no longer considered the claimant an employee as of March 4, the date he took the positive drug test.

The claimant established a claim for unemployment insurance benefits during the week of July 25, 2004. On August 19, 2004, a representative's decision was mailed to the claimant and employer. The representative's decision was not mailed to the claimant's current mailing address. The decision indicated the claimant was not qualified to receive unemployment insurance benefits as of July 25, 2004.

The claimant did not receive the representative's decision. The claimant learned about the decision when he contacted the Department on August 31, 2004. The claimant filed his appeal at his local Workforce office on August 31, 2004.

REASONING AND CONCLUSIONS OF LAW:

Unless the claimant or other interested party, after notification or within ten calendar days after a representative's decision is mailed to the parties' last-known address, files an appeal from the decision, the decision is final. Benefits shall then be paid or denied in accordance with the representative's decision. Iowa Code §96.6-2. 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 Iowa Supreme Court has ruled that appeals from unemployment insurance decisions must be filed within the time limit set by statute and the administrative law judge has no authority to

review a decision if a timely appeal is not filed. Franklin v. IDJS, 277 N.W.2d 877, 881 (Iowa 1979); Beardslee v. IDJS, 276 N.W.2d 373 (Iowa 1979). In this case, the claimant's appeal was filed after the August 29 deadline for appealing expired.

The next question is whether the claimant had a reasonable opportunity to file 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 administrative record indicates the claimant did not have a reasonable opportunity to file a timely appeal.

The claimant's failure to file a timely appeal was due to an Agency error or misinformation, which under 871 IAC 24.35(2) excuses the delay in filing an appeal. Since the administrative record indicates the claimant had a legal excuse for filing a late appeal, the Appeals Section has jurisdiction to make a decision on the merits of the appeal.

For unemployment insurance purposes, misconduct amounts to a deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment. Misconduct is a deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees or is an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated incidents, or good faith errors in judgment or discretion are not deemed to constitute work-connected misconduct. 871 IAC 24.32(1)(a). The Iowa Supreme Court has ruled that an employer cannot establish disqualifying misconduct based on a drug or alcohol test performed in violation of Iowa's drug and alcohol testing laws. Eaton v. Iowa Employment Appeal Board, 602 N.W.2d 553, 558 (Iowa 1999).

Iowa Code § 730.5-1-h(5) states:

"Reasonable suspicion drug or alcohol testing" means drug or alcohol testing based upon evidence that an employee is using or has used alcohol or other drugs in violation of the employer's written policy drawn from specific objective and articulable facts and reasonable inferences drawn from those facts in light of experience. For purposes of this paragraph, facts and inferences may be based upon, but not limited to: Evidence that an employee has caused an accident while at work which resulted in an injury to a person for which injury, if suffered by an employee, a record or report could be required under chapter 88, or resulted in damage to property, including to equipment, in an amount reasonably estimated at the time of the accident to exceed one thousand dollars.

Although the employer's policy provides for drug testing after an accident, the test performed on March 4 has little, if anything, to do with the incident that may have led to the claimant's back problems on February 9, 2004. Therefore, the satisfied the reasonable suspicion requirement of the law and the results from a drug test on March 4, 2004, cannot be used to disqualify the claimant from receiving unemployment insurance benefits. As of July 25, 2004, the claimant is qualified to receive unemployment insurance benefits. As of the date of the hearing, the claimant has not filed any weekly claims.

DECISION:

The representative's August 19, 2004 decision (reference 01) is reversed. The claimant established a legal excuse for filing a late appeal. Therefore, the Appeals Section has jurisdiction to address the merits of his appeal. The employer had compelling business reasons for discharging the claimant but did not establish that the claimant committed work-connected

misconduct. As of July 25, 2004, the claimant is qualified to receive unemployment insurance benefits, provided he meets all other eligibility requirements. The employer's account may be charged for benefits paid to the claimant.

dlw/b