

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

TENNILLE R MCCONNELL
1620 HILLCREST CT
MARION IA 52302

GARNETT PLACE INC
208 – 35TH STREET DR SE #500
CEDAR RAPIDS IA 52403

Appeal Number: 04A-UI-06181-RT
OC: 04-11-04 R: 03
Claimant: Respondent (1)

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 96.6-2 – Initial Determination (Timeliness of Appeal)

STATEMENT OF THE CASE:

The employer, Garnett Place, Inc., filed an appeal from an unemployment insurance decision dated May 17, 2004, reference 01, allowing unemployment insurance benefits to the claimant, Tennille R. McConnell. After due notice was issued, a telephone hearing was held on June 22, 2004 with the claimant participating. Justine Omar, Manager, participated in the hearing for the employer. Matthew Mullins, Assistant Manager, was available to testify for the employer but not called because his testimony would have been repetitive and unnecessary. Department Exhibit 1 in its entirety was admitted into evidence. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant. The hearing was scheduled to begin at 3:00 p.m. but really did not start until

3:30 p.m. because the administrative law judge had some significant difficulties in reaching the claimant. Eventually, the administrative law judge reached the claimant at a working telephone number and the claimant participated in the entire hearing.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Department Exhibit 1, the administrative law judge finds: An authorized representative of Iowa Workforce Development issued a decision in this matter on May 17, 2004, reference 01, determining that the claimant was eligible to receive unemployment insurance benefits because records indicate she was dismissed from work on April 8, 2004 for unsatisfactory work but not performing work to her employer's satisfaction is not misconduct. That decision was sent on the same day, May 17, 2004, to the employer. The employer received that decision on May 18 or May 19, 2004. That decision indicated that an appeal had to be postmarked or otherwise received by the Appeals Section by May 27, 2004. However, the employer's appeal was mailed in an envelope bearing a postmark of June 2, 2004, six days late. The reason for the delay in the filing of the appeal was that the employer did not mail it promptly. The employer received the decision on May 18 or May 19, 2004. The employer's witness, Justine Omar, Manager, completed the appeal letter on or before May 26, 2004. She was unable to mail the appeal letter that day because she did not have postage. She left the letter with her administrative assistant on May 26, 2004 to be mailed the next day, May 27, 2004. Ms. Omar then went on a vacation over the Memorial Day long weekend and when she returned to the office on June 1, 2004 learned that the appeal had not been mailed. Ms. Omar then put the letter in the post office box on that day but apparently after the mail had been picked up and so the letter did not go out until June 2, 2004. Ms. Omar had no explanation as to why the administrative assistant did not mail it on May 27, 2004 or any day thereafter. If the appeal had been mailed on May 27, 2004 it would have been timely.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the employer filed a timely appeal or, if not, whether the employer demonstrated good cause for such failure. The employer's appeal is not timely and the employer has not demonstrated good cause for a delay in the filing of its appeal and, as a consequence, the employer's appeal should not be accepted and the administrative law judge has no jurisdiction to reach the remaining issues.
2. Whether the claimant's separation from employment was a disqualifying event. The administrative law judge does not have jurisdiction to reach that issue.
3. Whether the claimant is overpaid unemployment insurance benefits. The administrative law judge does not have jurisdiction to reach that issue.

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).

(1) The record shows that the appellant did have a reasonable opportunity to file a timely appeal.

The administrative law judge concludes that the employer has the burden to prove that its appeal was timely or that it had good cause for a delay in the filing of its appeal. The administrative law judge concludes that the employer has not met its burden of proof to demonstrate by a preponderance of the evidence either that its appeal was timely or that it had good cause for a delay in the filing of its appeal. On its face, the employer's appeal is not timely as set out in the findings fact and as shown at Department Exhibit 1. The employer's

witness, Justine Omar, Manager, credibly testified and candidly testified that she received the decision from which the employer seeks to appeal on May 18 or May 19, 2004. The administrative law judge believes that this gave the employer more than ample or sufficient time to file the appeal. Ms. Omar testified that she completed the appeal on or before May 26, 2004 but could not mail it because of a lack of postage. She then dated the appeal May 27, 2004 and instructed her administrative assistant to mail it that day. Ms. Omar then went on a vacation over the Memorial Day weekend beginning May 27, 2004. When she returned to the office on June 1, 2004, she learned that the appeal letter had not been mailed and attempted to mail it that day but apparently after the mail had been picked up so it was not mailed and postmarked until June 2, 2004. Under the evidence here, the administrative law judge is constrained to conclude that, based upon the date of receipt of the decision, the employer had more than ample and sufficient time to do an appeal and file an appeal but failed to do so. Ms. Omar had no explanation as why the administrative assistant did not mail it on May 27, 2004. If it had been mailed on May 27, 2004, it would have been timely. The decision could also have been mailed on other days thereafter but was not until June 2, 2004. There is no evidence that the delay in the filing of the appeal was at the fault of Iowa Workforce Development or the U.S. Postal Service. Rather, it appears that the delay was because of the employer. Accordingly, the administrative law judge concludes that the employer's attempted appeal of the decision dated May 17, 2004, reference 01, is not timely and the employer has not demonstrated good cause for the delay in the filing of its appeal. Therefore, the administrative law judge concludes that the employer's appeal should not be accepted and that he lacks jurisdiction to make a determination with respect to the other issues. The administrative law judge finally concludes that the representative's decision of May 17, 2004, reference 01, should remain in full force and effect.

DECISION:

The representative's decision of May 17, 2004, reference 01, is to remain in full force and effect.. The claimant, Tennille R. McConnell, is entitled to receive unemployment insurance benefits, provided she is otherwise eligible. The employer's attempted appeal is not timely and the employer has not demonstrated good cause for its delay.

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