

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JULIO M VILLACORTA MENJIVAR
Claimant

APPEAL NO. 08O-UI-07760-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**IOWA WORKFORCE
DEVELOPMENT DEPARTMENT**

**OC: 01/06/08 R: 03
Claimant: Appellant (1)**

Iowa Code Section 96.3(7) – Overpayment
Iowa Code Section 96.6(2) – Timeliness of Appeal

STATEMENT OF THE CASE:

Julio Villacorta Menjivar filed an appeal from the March 10, 2008, reference 07, decision that he was overpaid \$798.00 in benefits for the period of January 6-26, 2008. After due notice was issued, a hearing was held by telephone conference call on September 29, 2008. Mr. Villacorta Menjivar participated. Spanish-English interpreter Ana Cox assisted with the hearing. The hearing in this matter was consolidated with the hearing in Appeal Number 08O-UI-07759-JTT. Department Exhibits D-1, D-2 and D-3 were received into evidence.

ISSUE:

Whether there is good cause to deem timely the claimant's late appeal of the March 10, 2008, reference 07, decision that denied benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: On February 1, 2008, Workforce Development mailed a copy of a February 1, 2008, reference 03, decision to Julio Villacorta Menjivar at his last-known address of record. Mr. Villacorta Menjivar received the decision in a timely fashion, prior to the deadline for appeal. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by February 11, 2008.

On March 10, 2008, Workforce Development mailed a copy of the March 10, 2008, reference 07, decision to Julio Villacorta Menjivar at his last-known address of record. Mr. Villacorta Menjivar received the decision in a timely fashion, prior to the deadline for appeal. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by March 20, 2008.

Mr. Villacorta Menjivar filed his appeal on July 8, 2008, when he signed an appeal form and delivered the appeal form to the Iowa City Workforce Development staff. Mr. Villacorta Menjivar's primary language is Spanish, but Mr. Villacorta Menjivar has some limited English

language skills. Mr. Villacorta Menjivar was aware, prior to February 1, 2008, that the Iowa City Workforce Development Center had bilingual staff available to assist him if he had questions about Workforce Development correspondence.

REASONING AND CONCLUSIONS OF LAW:

Based on Mr. Villacorta Menjivar's internally inconsistent testimony, the administrative law judge specifically finds that Mr. Villacorta Menjivar is not a reliable historian. The administrative law judge specifically finds that Mr. Villacorta Menjivar's failure to provide more meaningful testimony about the nature and timing of his contact(s) with Workforce Development is not attributable to a language barrier.

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-day deadline for appeal begins to run on the date Workforce Development mails the decision to the parties. The "decision date" found in the upper right-hand portion of the Agency 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).

An appeal submitted by mail is deemed filed 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 was 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. See 871 AC 24.35(1)(a). See also

Messina v. IDJS, 341 N.W.2d 52 (Iowa 1983). See also Pepsi-Cola Bottling Company of Cedar Rapids v. Employment Appeal Board, 465 N.W.2d 674 (Iowa App. 1990). An appeal submitted by any other means is deemed filed on the date it is received by the Unemployment Insurance Division of Iowa Workforce Development. See 871 IAC 24.35(1)(b).

In this case the appeal was filed on July 8, 2008, when Mr. Villacorta Menjivar delivered the appeal form to the Workforce Development Center staff.

The evidence in the record establishes that more than ten calendar days elapsed between the mailing date and the date this appeal was filed. In fact, the appeal of the reference 07 overpayment decision was filed more than three months after the March 20, 2008 deadline for appeal had passed. 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 have a reasonable opportunity to file a timely appeal.

The administrative law judge concludes that Mr. Villacorta Menjivar's failure to file a timely appeal within the time prescribed by the Iowa Employment Security Law was not due to any Agency error or misinformation or delay or other action of the United States Postal Service. See 871 IAC 24.35(2). There is not good cause to deem the late appeal timely. The appeal was not timely filed pursuant to Iowa Code section 96.6(2) and the administrative law judge lacks jurisdiction to make a determination with respect to the nature of the appeal. See, Beardslee v. IDJS, 276 N.W.2d 373 (Iowa 1979) and Franklin v. IDJS, 277 N.W.2d 877 (Iowa 1979).

DECISION:

The Agency representative's the March 10, 2008, reference 07, overpayment is affirmed. The appeal in this case was not timely, and the decision of the representative remains in effect.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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