IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

STERLING T LOFTUS
Claimant

CINGULAR WIRELESS LLC
Employer

APPEAL NO: 06A-UI-09025-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 06/04/06 R: 01
Claimant: Respondent (1)

Section 96.6-2 - Timeliness of Appeal

STATEMENT OF THE CASE:

Cingular Wireless L.L.C. (employer) appealed a representative's June 21, 2006 decision (reference 01) that concluded Sterling T. Loftus (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on September 25, 2006. The claimant participated in the hearing and was represented by Ken Murdis, union representative. Howard Kiesling appeared on the employer's behalf. During the hearing, Exhibit A-1 and Employer's Exhibit One 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.

ISSUE:

Was the employer's appeal timely or are there legal grounds under which it can be treated as timely?

FINDINGS OF FACT:

The representative's decision was mailed to the employer's last-known address of record on June 21, 2006. After being forwarded to a new address in the same metropolitan area, the employer's central corporate office in Texas received the decision on June 26, 2006. That office scanned the representative's decision and sent it as an attachment to an email addressed to both Mr. Kiesling and another human resources manager in the employer's Minnesota regional office. Mr. Kiesling was the human resources manager, however, under whom the claimant's employment fell.

The representative's decision contained a warning that an appeal must be postmarked or received by the Appeals Section by July 1, 2006. The notice also provided that if the appeal date fell on a Saturday, Sunday, or legal holiday, the appeal period was extended to the next working day, which in this case was Monday, July 3, 2006. The appeal was not filed until it was faxed on July 11, 2006, which is after the date noticed on the disqualification decision.

Mr. Kiesling was in and out of the office on June 29, and was then out of town at least from July 1 returning July 10, 2006. No arrangements were made to have anyone else screening his correspondence for time-sensitive communications such as issues regarding unemployment insurance claims.

The Agency sent the employer a corrected notice of the filing of a claim by the claimant on June 29, 2006 which was also forwarded from the Texas corporate office to Mr. Kiesling at the regional office. This had a deadline for response of July 10, 2006. This also was not acted upon during Mr. Kiesling's vacation as no back-up or communication screening arrangement had been made. However, the notice already indicated that "based on claimant information, you may be notified about a fact-finding interview prior to returning this notice. You still must return this notice by the due date to report other issues or pay." Mr. Kiesling in fact had already been contacted by the Agency representative for a fact-finding interview on June 20, 2006, to whom he provided some summary information and the names and telephone numbers of the employer witnesses with whom he felt the representative should speak regarding the specifics. The representative's decision issued on June 21 was as a result of the information obtained by the representative in the June 20 fact-finding interview.

Upon his return to work on July 11, Mr. Kiesling submitted one combined response to the notice of claim and the representative's decision.

REASONING AND CONCLUSIONS OF LAW:

If a party fails to make a timely appeal of a representative's decision and there is no legal excuse under which the appeal can be deemed to have been made timely, the decision as to the merits has become final and is not subject to further review.

Iowa Code § 96.6-2 provides in pertinent part:

> 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. . . . 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.

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

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 fact that there was a corrected notice of claim sent to the employer that did not require a response until July 10, 2006 did not extend the statutory time for the employer to appeal the adverse representative's decision; the language on the notice of claim itself put the employer on notice that a response was irrelevant as to the separation issues. The employer's central corporate office did actually physically receive the representative's decision a week before the effective appeal deadline. The record shows that the appellant did have a reasonable opportunity to file a timely appeal.

871 IAC 24.35(2) provides in pertinent part:

> 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.

The administrative law judge concludes that 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 pursuant to 871 IAC 24.35(2) or other factors outside the appellant's control. The failure to ensure that there was not coverage or screening of communication for time-sensitive unemployment insurance matters during Mr. Kiesling's absence was a business decision for which the employer, not the claimant, must bear the consequences. The administrative law judge further concludes that because the appeal was not timely filed pursuant to Iowa Code § 96.6-2, the administrative law judge lacks jurisdiction to make a determination with respect to the nature of the appeal, regardless of whether the merits of the appeal would be valid. See, Beardslee v. IDJS, 276 N.W.2d 373 (Iowa 1979); Franklin, supra; and Pepsi-Cola Bottling Company v. Employment Appeal Board, 465 N.W.2d 674 (Iowa App. 1990).

DECISION:

The representative's June 21, 2006 decision (reference 01) is affirmed. The appeal in this case was not timely, and the decision of the representative has become final and remains in full force and effect. Benefits are allowed.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

ld/pjs