

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ANDREW E LOWE
Claimant

APPEAL NO. 09A-UI-03304-CT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**EMPIRE FOUNDRY PRODUCTION
& RECLAIM INC**
Employer

OC: 01/04/09
Claimant: Appellant (1)

Section 96.5(1)d – Separation Due to Illness/Injury
Section 96.6(2) – Timeliness of Appeals

STATEMENT OF THE CASE:

Andrew Lowe filed an appeal from a representative's decision dated February 17, 2009, reference 01, which denied benefits based on his separation from Empire Foundry Production & Reclaim, Inc. (Empire) After due notice was issued, a hearing was held by telephone on March 26, 2009. Mr. Lowe participated personally. The employer participated by Jeremy Brown, Owner/Vice President.

ISSUE:

At issue in this matter is whether the appeal filed herein was timely. A secondary issue is whether Mr. Lowe is entitled to job insurance benefits based on his separation from Empire.

FINDINGS OF FACT:

The administrative law judge, having considered all of the evidence in the record, finds that: A disqualification decision was mailed to Mr. Lowe's last-known address of record on February 17, 2009. He received the decision. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by February 27, 2009. The appeal was not filed until March 2, 2009, which is after the date noticed on the disqualification decision.

Mr. Lowe was employed by Empire beginning December 3, 2008 as a full-time laborer. He notified the employer that he was to have knee surgery on January 17, 2009 and would be gone for approximately ten weeks. The condition was not related to his employment as he had been experiencing problems with the knees before his employment. He was told he could reapply for employment once released by his doctor to return to work.

Mr. Lowe's last day of work was January 12, 2009. He was replaced in his job shortly thereafter. He was released to full duty on March 2, 2009. He contacted the employer on March 5 but the employer would not discuss a return to work with him because of his pending claim for job insurance benefits. Mr. Lowe had filed a claim for benefits effective January 4, 2009 because he did not know he would be ineligible for benefits while off work due to surgery.

REASONING AND CONCLUSIONS OF LAW:

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). The record shows that the appellant did have a reasonable opportunity to file a timely appeal. Mr. Lowe could offer no explanation as to why his appeal was not filed by the

February 27, 2009 due date. Because the appeal was not timely, the administrative law judge has no jurisdiction to change the decision denying benefits effective January 12, 2009.

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). The administrative law judge further concludes that 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).

The decision at issue only disqualified Mr. Lowe from receiving benefits until such time as he satisfied the requirements of Iowa Code section 96.5(1)d. At the time the decision was issued, he had not been released by his doctor to return to work. Therefore, there had been no opportunity to comply with the provisions of section 96.5(1)d. He subsequently qualified for benefits on March 5, 2009 when he re-offered his services to the employer. At that point, he had satisfied the requirements of section 96.5(1)d. Because no work was made available when Mr. Lowe re-offered his services, benefits are allowed as of the Sunday of the week in which he re-offered his services, March 1, 2009.

DECISION:

The representative's decision dated February 17, 2009, reference 01, is hereby affirmed. The appeal in this case was not timely and the decision of the representative remains in effect. Mr. Lowe is denied benefits effective January 4, 2009. He subsequently qualified for benefits effective March 1, 2009 as no work was made available when he re-offered his services to the employer. Benefits are allowed effective March 1, 2009, provided he satisfies all other conditions of eligibility.

Carolyn F. Coleman
Administrative Law Judge

Decision Dated and Mailed

cfc/pjs