

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TODD J NACE
Claimant

APPEAL NO. 09A-UI-06619-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

PELLA CORPORATION
Employer

OC: 03/22/09
Claimant: Respondent (1)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Code Section 96.6(2) - Timeliness of Appeal

STATEMENT OF THE CASE:

The employer filed an appeal from the April 13, 2009, reference 01, decision that allowed. After due notice was issued, a hearing was held by telephone conference call on May 26, 2009. Claimant Todd Nace participated. Angie Stevens represented the employer and presented testimony through Gavin Walker, TALX Unemployment Insurance Consultant Lead. Department Exhibits D-1 and D2 were received into evidence.

ISSUE:

Whether the employer's appeal was timely.

Whether there is good cause to deem the employer's late appeal timely.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: On April 13, 2009, Workforce Development mailed a copy of the reference 01, decision to the employer's last-known address of record. The employer's representative of record is Talx Employer Services, L.L.C. The employer's address of record is c/o Talx Employer Services, L.L.C., P.O. Box 1160, Columbus, OH 43216. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by April 23, 2009. The employer representative received the decision on April 16, 2009 and scanned the decision into its computer system. On April 23, the day the appeal was due, Gavin Walker, TALX Unemployment Insurance Consultant Lead, prepared an appeal, printed a copy and took the appeal to the mailroom. Mr. Walker learned later in the day, that the mailroom did not mail the appeal. The employer's third-party mail processor had already come and gone by the time Mr. Walker put the decision in an envelope and addressed the envelope. Mr. Walker took the envelope to a United States Post Office. The line for the service window was long, so Mr. Walker used an automated postage machine to purchase a stamp. The stamp has April 23, 2009 printed on its face as the date of purchase. At approximately 6:15 p.m. on April 23, Mr. Walker placed the appeal in a mailbox at the Post Office. The Post Office postmarked the

appeal envelope on April 24, 2009 at 4:00 p.m. The postmark is legible. The Appeals Section received the employer's mailed appeal on April 28, 2009.

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-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 postmark 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).

Pepsi-Cola Bottling is on point and controls the outcome in this case. In that case, the employer waited until the day the appeal was due to take action on the appeal. The employer put the appeal in an envelope and attached appropriate postage. The postage meter mark bore the appeal deadline date. After business hours, the employer deposited the appeal in a mail box at

the Post Office. The Post Office postmarked the appeal the following day, one day beyond the appeal deadline. The Iowa Court of Appeals held that the administrative rule was clear on its face concerning the effective filing date of a mailed appeal, that the postmark date controlled, and that and that the appeal was untimely.

In the present case, the appeal was filed on April 24, 2009, the date indicated on the legible postmark.

The evidence in the record establishes 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.

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. See 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).

DECISION:

The Agency representative's April 13, 2009, reference 01, decision 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

jet/css