

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KRISTI R HERRILL
Claimant

APPEAL NO. 16A-UI-13236-S1-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

A & M SERVICES INC
A & M LAUNDRY
Employer

OC: 05/25/14
Claimant: Appellant (1)

Section 96.4-3 – Able and Available
Section 96.6(2) - Timeliness of Appeal

STATEMENT OF THE CASE:

Kristi Herrill (claimant) appealed a representative's June 18, 2014, decision (reference 01) that concluded she was not eligible to receive unemployment insurance benefits after her separation from employment with A & M services (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for January 5, 2017. The claimant participated personally. The employer participated by Tina Norgaard, Office Payroll Manager, and Ryan Kasperbauer, General Manager. Exhibits D-1 and D-2 were received into evidence.

ISSUE:

The issue is whether the appeal was filed in a timely manner and, if so, whether the claimant was able and available for work as of May 25, 2016.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on August 8, 2006, as a full-time laborer. The claimant did not work full-time hours. She frequently called in saying she could not work due to pain or problems with co-workers. The employer took care of the co-worker problem but the claimant continued to be absent from work. The claimant filed for unemployment insurance benefits with an effective date of May 25, 2014. The claimant continued to work for the employer until October 21, 2014. The claimant was incarcerated from November 1 to December 1, 2014. She moved to a rehabilitation therapy facility in Sioux City, Iowa, on April 26, 2015. She was at the facility until September 2015.

A disqualification decision was mailed to the claimant's last-known address of record on June 18, 2014. The claimant did not receive the decision within ten days. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by June 28, 2014. The claimant received the decision on or about December 1, 2016. The appeal was not filed until December 13, 2016. The claimant did not file immediately because she

wanted to talk to a worker at the agency. She did not contact a worker at the agency until December 13, 2016.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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).

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 not receive the decision within ten days of the

mailing date. After she received the decision she took twelve days to file her appeal, longer than the ten day appeal period.

The administrative law judge concludes that her failure to file a timely appeal after receiving notice of the decision 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 § 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).

If the decision could be considered timely, the next issue would be whether the claimant was able and available for work as of May 25, 2014. The administrative law judge concludes she was not.

Iowa Admin. Code r. 871-24.23(23) provides:

Availability disqualifications. The following are reasons for a claimant being disqualified for being unavailable for work.

(23) The claimant's availability for other work is unduly limited because such claimant is working to such a degree that removes the claimant from the labor market.

The claimant was working full-time for the employer as of May 25, 2014. The claimant is disqualified from receiving unemployment insurance benefits because she was not available for other work on May 25, 2014.

DECISION:

The representative's June 18, 2014, decision (reference 01) is affirmed. The appeal in this case was not timely, and the decision of the representative remains in effect. The claimant is not eligible to receive unemployment insurance benefits as of May 25, 2014.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/rvs