

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

CYNTHIA V ALSBERRY
Claimant

APPEAL 19A-UI-00030-DB-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**IOWA WORKFORCE DEVELOPMENT
DEPARTMENT**

**OC: 10/15/06
Claimant: Appellant (1)**

Iowa Code § 96.6(2) - Timeliness of Appeal
Iowa Code § 96.16(4) – Overpayment of Benefits due to Misrepresentation

STATEMENT OF THE CASE:

The claimant/appellant filed an appeal from the April 22, 2009 (reference 01) unemployment insurance decision that found the claimant was overpaid unemployment insurance benefits in the amount of \$3,653.00 between July 6, 2008 and October 18, 2008 due to misrepresentation when she failed to properly report wages earned from Hyatt Corporation. The parties were properly notified of the hearing. A telephone hearing was held on January 18, 2019. The claimant, Cynthia V. Alsberry, participated personally. Iowa Workforce Development (“IWD”) participated through witness Kevan Irvine.

ISSUE:

Is the claimant's appeal timely?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

A decision finding that the claimant was overpaid unemployment insurance benefits of \$3,653.00 for fifteen weeks between July 6, 2008 and October 18, 2008 was mailed to the claimant's last known address of record on April 22, 2009. The claimant does not remember receiving the decision in the mail. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by May 2, 2009.

The claimant received a statement of amount due on November 30, 2018 listing the overpayment amount of \$3,653.00. She contacted IWD and was told she could file an appeal online. She attempted to file an appeal online; however, the system would not let her do so. She contacted IWD again and received an address where she could mail her appeal to the Appeals Section. Claimant mailed her appeal letter and it was postmarked on December 29, 2018. See Exhibit 4. Claimant did not remember what date she contacted IWD on the two occasions between November 30, 2018 and December 29, 2018.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant's appeal is untimely.

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 § 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to § 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 § 96.5, subsection 10, and has the burden of proving that a voluntary quit pursuant to § 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving § 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 § 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. Bd. of Adjustment*, 239 N.W.2d 873, 92 A.L.R.3d 304 (Iowa 1976). The appeal in this case was filed by mail and the envelope was postmarked December 29, 2018. The appeal was submitted more than nine years after the appeal deadline.

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. Iowa Dep't of Job Serv.*, 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. Iowa Dep't of Job Serv.*, 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. Iowa Emp't Sec. Comm'n*, 217 N.W.2d 255 (Iowa 1974); *Smith v. Iowa Emp't Sec. Comm'n*, 212 N.W.2d 471, 472 (Iowa 1973). The record

shows that the appellant knew that the department had found an overpayment of benefits when she received the statement on November 30, 2018. At that point, it took her almost a month to file her appeal. While a portion of the time may have been due to her being unable to file an online appeal, claimant could not credibly establish on what dates she had contacted IWD. It is her burden to establish that the delay in submission was due to division error or misinformation or due to delay or other action of the United States postal service. She did not meet that burden.

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 Iowa Admin. Code r. 871-24.35(2). Claimant waited almost a full month after learning about the decision before she filed an appeal with the Appeals Section. As such, the administrative law judge 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. Iowa Dep't of Job Serv.*, 276 N.W.2d 373 (Iowa 1979) and *Franklin v. Iowa Dep't of Job Serv.*, 277 N.W.2d 877 (Iowa 1979).

DECISION:

The April 22, 2009 (reference 01) decision is affirmed. The appeal in this case was not timely, and the decision of the representative remains in effect.

Dawn Boucher
Administrative Law Judge

Decision Dated and Mailed

db/rvs