

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**TIM C SCHMIDT**  
Claimant

**APPEAL NO. 10A-UI-08859-VST**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**DANIEL KUNKEL**  
Employer

**OC: 03/14/10**  
**Claimant: Appellant (1)**

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

**STATEMENT OF THE CASE:**

The claimant filed an appeal from a representative's decision dated April 7, 2010, reference 01, which held the claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on October 12, 2010. The claimant participated. The employer participated by Daniel Kunkel, Dave Kirkman, and Joann Johnson. The record consists of the testimony of Tim Schmidt and the testimony of Joann Johnson. Official notice is taken of agency records.

**ISSUE:**

Whether the claimant filed a timely appeal.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

On April 7, 2010, a representative issued a decision that held that the claimant was ineligible for unemployment insurance benefits. The decision also states that the decision would become final unless an appeal was postmarked by April 17, 2010, or received by the appeal section on that date. The claimant's appeal was filed on June 22, 2010.

**REASONING AND CONCLUSIONS OF LAW:**

The preliminary issue in this case is whether the claimant timely appealed the representative's decision. Iowa Code section 96.6-2 provides that unless the affected party (here, the claimant) files an appeal from the decision within ten calendar days, the decision is final and benefits shall be paid or denied as set out by 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 record shows that the appellant did have a reasonable opportunity to file an appeal postmarked as timely.

The administrative law judge concludes that the appellant's failure have the appeal timely postmarked within the time prescribed by the Iowa Employment Security Law was not due to error, misinformation, delay, or other action of the United States Postal Service pursuant to 871 IAC 24.35(2). There is no evidence of agency error. The claimant testified that he gave his appeal to Joann Johnson to be faxed to the agency. Ms. Johnson acknowledged that she did fax things for the claimant on occasion, but she does not know if one of those documents was the claimant's appeal. The claimant did not check to see if there was a confirmation that the fax was received. Ms. Johnson does not have any records that would confirm or deny that a fax was sent and received. It was the claimant's responsibility to ensure that his appeal was timely filed. Although fax filing is permissible, there is no evidence that a fax was received by the agency. The claimant checked on his appeal with the local workforce center and found out that the fax apparently had not gone through. Before the time limit can be exceeded, there has to be evidence of agency error or postal service error. There is no evidence of either in this case. Since the claimant's appeal is not timely, the administrative law judge has no jurisdiction to rule on the merits of the claimant's claim for unemployment insurance benefits.

**DECISION:**

The claimant failed to file a timely appeal from the representative's decision dated April 7, 2010, reference 01. That decision, which concluded that the claimant was not eligible to receive unemployment insurance benefits, remains in full force and effect.

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Vicki L. Seeck  
Administrative Law Judge

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Decision Dated and Mailed

vls/kjw