BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319

RIGOBERTO D HERNANDEZ	:	
	:	**HEARING NUMBER:** 16B-UI-02646
Claimant	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
MANPOWER INC OF DM	:	
Employer		

SECTION: 96.5-1-J, 96.6-2

D E C I S I O N

The Claimant appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. The Appeal Board, one member dissenting, finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

On January 7, 2016, a representative's decision was mailed to Rigoberto Hernandez (Claimant) who is not proficient in English. The decision was mailed to the Claimant's last known address as supplied to Iowa Workforce, but he never received this decision. The Claimant learned of this decision after he received the overpayment decision in late January or early February. He contacted the agency for assistance which caused further delay (due to language barrier) and subsequently filed his appeal on March 1, 2016.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code 96.6 provides:

> 2. *Initial determination.* … 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.

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 - but not conclusive - evidence of the date of mailing.

There is a mandatory duty to file appeals from representatives' decisions within the time allotted by statute, and the Administrative Law Judge and this Board have no authority to change the decision of representative if a timely appeal is not filed. *Franklin v. Iowa Dept. Job Service*, 277 N.W.2d 877, 881 (Iowa 1979). The ten day period for appealing an initial determination concerning a claim for benefits has been described as jurisdictional. *Messina v. Iowa Dept. of Job Service,* 341 N.W.2d 52, 55 (Iowa 1983); *Beardslee v. Iowa Dept. Job Service*, 276 N.W.2d 373 (Iowa 1979). The only basis for changing the ten-day period would be where notice to the appealing party was constitutionally invalid. *E.g. Beardslee v. Iowa Dept. Job* Service, 276 N.W.2d 373, 377 (Iowa 1979). The question in such cases becomes whether the appellant was deprived of a reasonable opportunity to assert an appeal in a timely fashion. *Hendren v. Iowa Employment Sec. Commission*, 217 N.W.2d 255 (Iowa 1974); *Smith v. Iowa Employment Sec. Commission,* 212 N.W.2d 471 (Iowa 1973). The question of whether the Claimant has been denied a reasonable opportunity to assert an appeal is also informed by rule 871-24.35(2) which states that "the submission of any …appeal…not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the division that the delay in submission was *due to* division error or misinformation or to delay or *other action of the United States postal service.*" (Emphasis added.)

The Clamant did not timely receive this decision until after the appeal deadline. His appeal was further delayed by the misinformation he received. For this reason, we shall consider the Claimant's appeal to be appeal timely.

DECISION:

The administrative law judge's decision dated April 1, 2016 is **REVERSED & REMANDED** to an administrative law judge in the Workforce Development Center, Appeals Section. The administrative law judge shall issue a decision on the merits of this case. The Administrative Law Judge may in the Administrative Law Judge's discretion conduct an additional hearing if the judge deems it necessary to develop issues that were not adequately addressed in the first hearing because of the disposition of the issue of timeliness. After the hearing, if any, the administrative law judge shall issue a decision that provides the parties appeal rights.

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Kim D. Schmett

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Ashley R. Koopmans

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James M. Strohman

AMG/fnv