

IOWA DEPARTMENT OF INSPECTIONS & APPEALS
Division of Administrative Hearings
Lucas State Office Building
Des Moines, Iowa 50319

Appeal Number: 07-IWDUI-017
OC: 04/09/06
Claimant: Appellant (1)

DECISION OF THE ADMINISTRATIVE LAW JUDGE

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor Lucas Building, Des Moines, Iowa 50319.**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

JILL E STENDER
700 PERSHING ROAD #15
MAQUOKETA IA 52060-2402

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

IOWA WORKFORCE DEVELOPMENT
INVESTIGATION AND RECOVERY
1000 EAST GRAND AVENUE
DES MOINES IA 50319-0209

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to the Department. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

DAN ANDERSON, IWD

(Administrative Law Judge)

February 9, 2007

(Dated and Mailed)

Iowa Code Section 96.6-2 - Timeliness of Appeal
871 IAC 26.14(7) - Request to Reopen

STATEMENT OF THE CASE:

The claimant appealed an Iowa Workforce Development decision dated August 30, 2006, reference 02, which held that the claimant was overpaid \$2,872.00 benefits, because she incorrectly reported or failed to report wages earned with Pacific Coast Feather Company during the period from April 17, 2005 and May 6, 2006.

A telephone hearing was scheduled and held on February 5, 2007, pursuant to due notice. The claimant did not participate. Tom Carnahan, Investigator, participated on behalf of the department. Departmental Exhibit One consisting of the claimant's appeal letter and envelope was received into evidence for the record.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witness, and having considered all of the evidence in the record, finds that: A decision was mailed to the claimant's last known address of record on August 30, 2006. The claimant received the decision. The decision contained a warning that an appeal must be postmarked or received by the Iowa Workforce Development on September 9, 2006.

The claimant interviewed with Investigator Carnahan during the audit review process that include a meeting shortly after the issuance of the August department decision. The claimant did not express an intent to appeal, as she did not disagree with the overpayment calculation.

The claimant wrote her appeal when she filed a new unemployment claim, and she learned that the department was recouping the overpayment by an offset procedure where her benefit entitlement was being used to repay the outstanding overpayment. The claimant did not offer any information regarding her late appeal.

The claimant failed to respond to the hearing notice prior to the hearing date and time. The claimant called-in after a close of the record, as she had failed to read and follow the hearing notice instructions about calling-in with a phone to participate in the hearing.

REASONING AND CONCLUSIONS OF LAW:

The first issue is whether the claimant established a good cause to reopen the record.

The administrative law judge concludes that the failure of the claimant to read and follow the hearing notice instructions is not a good cause to reopen the record. The department rule, 871 IAC 26.14(7), does not allow the administrative law judge to receive evidence from the claimant when the department representative is no longer on the telephone due to a closing of the record. When the claimant was asked about the late call, she acknowledged that she failed to read and following the notice instructions prior to the hearing.

The issue is whether the appeal has been filed in a timely manner.

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.

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.

Case law commentary on timeliness:

The ten calendar days for appeal begin 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 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).

In this case, the appealing party had a reasonable opportunity to file a timely appeal, and no good cause has been established for the filing of any late appeal. It is apparent that the claimant disagrees with the department procedure about it using an offset on a new claim in order to recoup the payment of an outstanding overpayment rather than disputing the overpayment amount, and this is the reason for the delay of the appeal. The claimant must note that re-coupment/repayment of an overpayment is not subject to appeal review.

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 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 decision of Iowa Workforce Development dated August 30, 2006, reference 02, is AFFIRMED. The appeal in this case was not timely, and the decision remains in force and effect. The claimant is overpaid benefits \$2,872 due to misrepresentation.

rls