

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

NOE V TORRES
Claimant

APPEAL NO. 17A-UI-11560-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SWIFT PORK COMPANY
Employer

OC: 10/15/17
Claimant: Appellant (1)

Iowa Code Section 96.4(3) – Able & Available
Iowa Code section 96.6(2) – Timeliness of Appeal

STATEMENT OF THE CASE:

Noe Torres filed an appeal from the October 27, 2017, reference 02, decision that denied benefits effective October 15, 2017, based on the Benefits Bureau deputy's conclusion that Mr. Torres was unable to work due to illness. After due notice was issued, a hearing was held on December 21, 2017. Mr. Torres participated. The employer was not available at the telephone number the employer registered for the hearing and did not participate. Spanish-English interpreter Christian Castano of CTS Language Link assisted with the hearing. The hearing in this matter was consolidated with the hearing in Appeal Number 17A-UI-11559-JTT. Exhibits A through D and Department Exhibits D-1, D-2 and D-3 were received into evidence.

ISSUES:

Whether there is good cause to treat Mr. Torres' late appeal from the October 27, 2017, reference 02, decision as a timely appeal.

If the appeal was timely, whether Mr. Torres has been able to work since he established his claim for benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: On October 27, 2017, Iowa Workforce Development mailed the October 27, 2017, reference 02, to claimant Noe Torres at his last-known address of record. The decision denied benefits effective October 15, 2017, based on the Benefits Bureau deputy's conclusion that Mr. Torres was unable to work due to illness. The decision stated that an appeal from the decision must be postmarked by November 6, 2017 or be received by the Appeals Bureau by that date. The weight of the evidence establishes that Mr. Torres received the decision in a timely manner, prior to the appeal deadline. Mr. Torres is a Spanish-speaking person. The October 27, 2017, reference 02, decision contained information in English and in Spanish. The Spanish information included a warning that an appeal from the decision must be postmarked or received within 10 calendar days from the decision date. The Spanish portion of the decision provided clear and concise instructions for filing an appeal. Mr. Torres did not take any steps to

file an appeal from the decision by the November 6, 2017 appeal deadline. On November 13, 2017, Mr. Torres went to the Ottumwa IowaWorks Center. While there, Mr. Torres was assisted by Workforce Advisor Sandra Trejo. Ms. Trejo reviewed Agency records and discerned two decisions that had been entered in connection with the claim for benefits that were decisions adverse to Mr. Torres. One of those decisions was the October 27, 2017, reference 02, decision. On November 13, Mr. Torres completed an appeal form for each adverse decision and delivered the completed forms to Ms. Trejo. Ms. Trejo forwarded the appeal forms to the Appeals Bureau by email that same day and the Appeals Bureau received the appeals that day.

Mr. Torres was most recently employed by Swift Pork Company, a/k/a JBS, as a full-time production laborer on the kill floor. On or about August 30, 2017, Mr. Torres suffered a stroke at work. Mr. Torres was transported to the University of Iowa Hospitals and Clinics (UIHC) and remained in the hospital until September 6, 2017, when he was discharged to home. While Mr. Torres was hospitalized, he received medical evaluation and treatment from the UIHC Department of Neurology. At the time Mr. Torres was discharged from the hospital, he was not released to return to work. Instead, a neurology resident referred Mr. Torres for occupational and/or physical therapy services and advised in writing that Mr. Torres would not be released to return to work until he was cleared to do so by an occupational therapist, physical therapist, or neurologist. Following Mr. Torres' discharge from the hospital, he returned to the employer with a medical note, dated September 5, 2017, from the neurology resident that provided the above information. While Mr. Torres asserts he was discharged from the employment, he was actually never released to return to the employment following his stroke. Mr. Torres has provided no medical documentation to Iowa Workforce Development other than the September 6, 2107 medical note that indicates he is not released to return to work.

REASONING AND CONCLUSIONS OF LAW:

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. 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, subsections 10 and 11, 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-day deadline for appeal begins to run on the date Workforce Development mails the decision to the parties. The "decision date" found in the upper right-hand portion of the Agency 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).

An appeal submitted by mail is deemed filed on the date it is mailed as shown by the postmark or in the absence of a postmark the postage meter mark of the envelope in which it was received, or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion. See 871 AC 24.35(1)(a). See also *Messina v. IDJS*, 341 N.W.2d 52 (Iowa 1983). An appeal submitted by any other means is deemed filed on the date it is received by the Unemployment Insurance Division of Iowa Workforce Development. See 871 IAC 24.35(1)(b).

The evidence in the record establishes 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 weight of the evidence in the record establishes that Mr. Torres had a reasonable opportunity to file appeal from the October 27, 2017, reference 02, decision, by the November 6, 2017 deadline, but elected to take any action on the matter until November 13, 2017. The decision provided information and guidance in both Spanish and English. The late filing of the appeal was attributable to Mr. Torres and not attributable to Iowa Workforce Development or the United States Postal Service. Accordingly, there is not good cause to treat the late appeal as a timely appeal. See Iowa Administrative Code rule 871-24.35(2). Because the appeal was not timely filed pursuant to Iowa Code section 96.6(2), the administrative law judge lacks jurisdiction to disturb the October 27, 2017, reference 02, decision. See, *Beardslee v. IDJS*, 276 N.W.2d 373 (Iowa 1979) and *Franklin v. IDJS*, 277 N.W.2d 877 (Iowa 1979).

Iowa Code section 96.4(3) provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph (1), or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements

of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

Iowa Admin. Code r. 871-24.22(1)a provides:

Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

(1) Able to work. An individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood.

a. Illness, injury or pregnancy. Each case is decided upon an individual basis, recognizing that various work opportunities present different physical requirements. A statement from a medical practitioner is considered prima facie evidence of the physical ability of the individual to perform the work required. A pregnant individual must meet the same criteria for determining ableness as do all other individuals.

Iowa Admin. Code r. 871-24.22(2) provides:

Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

(2) Available for work. The availability requirement is satisfied when an individual is willing, able, and ready to accept suitable work which the individual does not have good cause to refuse, that is, the individual is genuinely attached to the labor market. Since, under unemployment insurance laws, it is the availability of an individual that is required to be tested, the labor market must be described in terms of the individual. A labor market for an individual means a market for the type of service which the individual offers in the geographical area in which the individual offers the service. Market in that sense does not mean that job vacancies must exist; the purpose of unemployment insurance is to compensate for lack of job vacancies. It means only that the type of services which an individual is offering is generally performed in the geographical area in which the individual is offering the services.

Iowa Admin. Code r. 871-24.23(1) provides:

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

(1) An individual who is ill and presently not able to perform work due to illness.

Iowa Admin. Code r. 871-24.23(35) provides:

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

(35) Where the claimant is not able to work and is under the care of a physician and has not been released as being able to work.

Even if Mr. Torres' appeal from the October 27, 2017, reference 02, decision had been timely, he presented insufficient evidence to establish that he has been medically able to work at any point since he established the unemployment insurance claim that was effective October 15, 2017. At the time Mr. Torres established the claim for benefits that was effective October 15, 2017, he had been under the care of a physician following a stroke that necessitated several days in the hospital and occupational and/or physical therapy. Mr. Torres has only provided one medical document and that document specifically stated that Mr. Torres would not be released to return to work until he was cleared by an occupational therapist, physical therapist or neurologist. Mr. Torres has presented no evidence to establish that any of the three types of professional has released him to return to work. Accordingly, even if the appeal had been timely, Mr. Torres has not met the able and available requirements and benefits would be denied effective October 15, 2017. The able and available disqualification would remain in place until Mr. Torres provides proof that he is released to return to work.

DECISION:

The October 27, 2017, reference 02, decision is affirmed. The claimant's appeal from the decision is untimely. Even if the appeal had been timely, the claimant has not presented sufficient evidence to establish that he has been medically able to work or available for work since he established his claim for benefits and benefits would be denied effective October 15, 2017. The able and available disqualification would remain in place until the claimant provides proof that he is released to return to work.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs