

**IOWA DEPARTMENT OF INSPECTIONS AND APPEALS
ADMINISTRATIVE HEARINGS DIVISION, UI APPEALS BUREAU**

THOMAS R CLEMEN
Claimant

APPEAL NO. 23A-UI-03710-JT-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

LOWE'S HOME CENTERS LLC
Employer

**OC: 01/29/23
Claimant: Appellant (1)**

Iowa Code Section 96.6(2) – Timeliness of Appeal
Iowa Code Section 96.4(3) – Able & Available
Iowa Code Section 96.1A(37) – Temporary and Partial Unemployment

STATEMENT OF THE CASE:

On April 10, 2023, Thomas Clemen (claimant) filed a late appeal from the March 9, 2023 (reference 02) decision that denied benefits effective January 29, 2023, based on the deputy's conclusion that the claimant was still employed with Lowe's Home Centers, L.L.C. under the same hours and wages as in the original contract of hire and could not be considered partially unemployed within the meaning of the law. After due notice was issued, a hearing was held on April 24, 2023. Claimant participated. The employer did not comply with the hearing notice instructions to call the toll-free number at the time of the hearing and did not participate. The hearing in this matter was consolidated with the hearing in Appeal Number 23A-UI-03711-JT-T. Exhibits A through E were received into evidence. The administrative law judge took official notice of the following Agency administrative records: DBRO, KCCO, KFFV & WAGE-B.

ISSUE:

Whether the appeal from the March 9, 2023 (reference 02) decision was timely. Whether there is good cause to treat the appeal as timely.

FINDINGS OF FACT:

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

Thomas Clemen (claimant) established an original claim for benefits that was effective January 29, 2023. Iowa Workforce Development set the weekly benefit amount at \$419.00. The claimant has been employed by Lowes Home Centers, L.L.C. since 2017. In September 2022, the claimant commenced working for the employer as a part-time cashier. The claimant transitioned to cashiering work from a customer service position in the electrical department after the claimant suffered a stroke in the fall of 2022. The claimant was hospitalized for about three weeks. When the claimant was released to return to work, the claimant was medically restricted to working no more than 24 hours a week. After the claimant returned to work, the claimant acquired an additional medical restriction whereby the claimant was to sit for five minutes every hour to 1.5 hours. The claimant filed his claim for unemployment insurance

benefits in response to a post-holiday temporary decrease in the number of work hours the employer had for the claimant. The claimant had not changed his availability schedule since returning to work in September 2022 and remained available to work from 6:00 a.m. to 10:00 p.m. seven days a week. During the weeks that ended February 4, 11, 18, and 25, the employer provided less than the claimant's usual number of hours and the claimant's wages did not meet or exceed the weekly benefit amount plus \$15.00. During the week that ended March 4, 2023, the employer provided a greater number of work hours and the claimant's weekly wages exceeded the weekly benefit amount plus \$15.00. The claimant made weekly claims for each of the five weeks between January 29, 2023 and March 4, 2023 and received partial benefits for the first four weeks. The claimant did not receive benefits for the week that ended March 4, 2023. Following the week that ended March 4, 2023, the claimant discontinued his claim for benefits.

On March 9, 2023, Iowa Workforce Development mailed the March 9, 2023 (reference 02) decision to the claimant's Epworth, Iowa last-known address of record. The reference 02 decision denied benefits effective January 29, 2023, based on the deputy's conclusion that the claimant was still employed with Lowe's Home Centers, L.L.C. under the same hours and wages as in the original contract of hire and could not be considered partially unemployed within the meaning of the law. The reference 02 decision stated the decision would become final unless an appeal was postmarked by March 19, 2023 or was received by the Appeals Section by that date. The decision stated that if the deadline for appeal fell on a Saturday, Sunday or legal holiday, the deadline would be extended to the next working day. March 19, 2023 was a Sunday and the next working day was Monday, March 20, 2023. The weight of the evidence indicates the claimant received the reference 02 decision in a timely manner, prior to the deadline for appeal. The claimant did not take steps to file an appeal from the decision by the extended March 20, 2023 appeal deadline.

On April 5, 2023, Iowa Workforce Development mailed the April 5, 2023 (reference 03) decision to the claimant's last-known address of record. The reference 03 decision held the claimant was overpaid \$1,278.00 in benefits for four weeks between January 29, 2023 through February 25, 2023, based on the March 9, 2023 decision that denied benefits for the affected period. The reference 03 overpayment decision included an April 15, 2023 deadline for appeal.

Though the claimant asserts the reference 02 and 03 decisions were delivered to him on the same day, the weight of the evidence indicates otherwise. The claimant did not have the decisions or the envelopes in which they were delivered with him at the time of the hearing. The decisions were mailed almost a month apart. In light of the IWD standard procedure for issuance of decisions, there would be no reasonable basis to conclude the March 9, 2023 (reference 02) disqualification decision was delivered to the claimant in April 2023 at the same times as the April 5, 2023 (reference 03) overpayment decision.

On April 10, 2023, the claimant faxed an appeal to the Appeals Bureau, the claimant attached a copy of the March 9, 2023 (reference 02) disqualification decision and the April 5, 2023 (reference 03) overpayment decision. The claimant included an IWD appeal form, dated April 9, 2023, that indicated he was appealing from the reference 02 decision and an appeal memo, dated April 9, 2023, that indicated he was appealing the overpayment decision. The claimant also attached a timekeeping record pertaining to his work hours. The Appeals Bureau received the faxed appeal on April 10, 2023.

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 Iowa Administrative Code rule 871-24.35(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 Iowa Administrative Code rule 871-24.35(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). One 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).

No submission shall be considered timely if the delay in filing was unreasonable, as determined by the division after considering the circumstances in the case. See Iowa Administrative Code rule 871-24.35(2)(c).

The evidence in the record establishes an April 10, 2023 untimely appeal from the March 9, 2023 (reference 02) decision. The weight of the evidence establishes that the claimant received the reference 02 decision in a timely manner, had a reasonable opportunity to file an appeal by the March 20, 2023 extended appeal deadline, but unreasonably delayed filing the appeal to April 10, 2023, after the claimant received the overpayment decision. The weight of the evidence indicates the late filing of the appeal from the reference 02 decision was not attributable to the IWD error or misinformation or delay or other action of 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 untimely, the administrative law judge lacks jurisdiction to disturb the reference 02 decision from which the appellant appeals in the present matter. See *Beardslee v. IDJS*, 276 N.W.2d 373 (Iowa 1979) and *Franklin v. IDJS*, 277 N.W.2d 877 (Iowa 1979).

DECISION:

The claimant's appeal from the March 9, 2023 (reference 02) decision was untimely. The decision that denied benefits effective January 29, 2023, based on the deputy's conclusion the claimant was not partially unemployed remains in effect and applies to the five weeks between January 29, 2023 and March 4, 2023.



James E. Timberland
Administrative Law Judge

April 26, 2023
Decision Dated and Mailed

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APPEAL RIGHTS. If you disagree with the decision, you or any interested party may:

1. Appeal to the Employment Appeal Board within fifteen (15) days of the date under the judge's signature by submitting a written appeal via mail, fax, or online to:

**Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
Online: eab.iowa.gov**

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.

AN APPEAL TO THE BOARD SHALL 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.

An Employment Appeal Board decision is final agency action. If a party disagrees with the Employment Appeal Board decision, they may then file a petition for judicial review in district court.

2. If no one files an appeal of the judge's decision with the Employment Appeal Board within fifteen (15) days, the decision becomes final agency action, and you have the option to file a petition for judicial review in District Court within thirty (30) days after the decision becomes final. Additional information on how to file a petition can be found at Iowa Code §17A.19, which is online at <https://www.legis.iowa.gov/docs/code/17A.19.pdf>.

Note to Parties: YOU MAY REPRESENT yourself in the appeal or obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. 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.

Note to Claimant: It is important that you file your weekly claim as directed, while this appeal is pending, to protect your continuing right to benefits.

SERVICE INFORMATION:

A true and correct copy of this decision was mailed to each of the parties listed.

DERECHOS DE APELACIÓN. Si no está de acuerdo con la decisión, usted o cualquier parte interesada puede:

1. Apelar a la Junta de Apelaciones de Empleo dentro de los quince (15) días de la fecha bajo la firma del juez presentando una apelación por escrito por correo, fax o en línea a:

**Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
En línea: eab.iowa.gov**

El período de apelación se extenderá hasta el siguiente día hábil si el último día para apelar cae en fin de semana o día feriado legal.

UNA APELACIÓN A LA JUNTA DEBE ESTABLECER CLARAMENTE:

- 1) El nombre, dirección y número de seguro social del reclamante.
- 2) Una referencia a la decisión de la que se toma la apelación.
- 3) Que se interponga recurso de apelación contra tal decisión y se firme dicho recurso.
- 4) Los fundamentos en que se funda dicho recurso.

Una decisión de la Junta de Apelaciones de Empleo es una acción final de la agencia. Si una de las partes no está de acuerdo con la decisión de la Junta de Apelación de Empleo, puede presentar una petición de revisión judicial en el tribunal de distrito.

2. Si nadie presenta una apelación de la decisión del juez ante la Junta de Apelaciones Laborales dentro de los quince (15) días, la decisión se convierte en acción final de la agencia y usted tiene la opción de presentar una petición de revisión judicial en el Tribunal de Distrito dentro de los treinta (30) días después de que la decisión adquiriera firmeza. Puede encontrar información adicional sobre cómo presentar una petición en el Código de Iowa §17A.19, que está en línea en <https://www.legis.iowa.gov/docs/code/17A.19.pdf>.

Nota para las partes: USTED PUEDE REPRESENTARSE en la apelación u obtener un abogado u otra parte interesada para que lo haga, siempre que no haya gastos para Workforce Development. Si desea ser representado por un abogado, puede obtener los servicios de un abogado privado o uno cuyos servicios se paguen con fondos públicos.

Nota para el reclamante: es importante que presente su reclamo semanal según las instrucciones, mientras esta apelación está pendiente, para proteger su derecho continuo a los beneficios.

SERVICIO DE INFORMACIÓN:

Se envió por correo una copia fiel y correcta de esta decisión a cada una de las partes enumeradas.