

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

SUE A OLDENBURGER
Claimant

APPEAL 17A-UI-04664-JCT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SIMPLY ESSENTIALS LLC
Employer

**OC: 04/17/16
Claimant: Respondent (1)**

Iowa Code § 96.6(2) – Timeliness of Appeal
Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the October 13, 2016, (reference 02) decision that allowed benefits based upon separation. After due notice was issued, a hearing was held by telephone conference call on May 19, 2017. Claimant participated personally. Employer participated through Clint Richmond, human resources and safety manager. Employer Exhibit A and Department Exhibit D-1 were received into evidence. The administrative law judge took official notice of the administrative records including the fact-finding documents and NMRO. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Did the employer file a timely appeal?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: An initial unemployment insurance decision was mailed to the employer's last known address of record on October 13, 2016. The initial decision was mailed in care of Angie Roberts at 12890 Foster St, Suite 220 in Overland Park, Kansas. This was a valid address for the employer and the correct address of record effective October 13, 2016. The initial decision contained a warning that an appeal must be postmarked or received by the Appeals Section by October 23, 2016. Ms. Roberts went on a medical leave of absence in late October 2016 and passed away in spring 2017. Mr. Richmond did not know if Ms. Roberts received the notice of initial decision allowing benefits, or whether the employer intended to appeal or attempted to appeal.

Ms. Roberts' office was in Overland Park and Mr. Richmond is located in Charles City, Iowa. Mr. Richmond acknowledged while Ms. Roberts was absent from work that her mail was

delegated to others for handling. No details were provided on how mail related to unemployment matters was handled in her absence.

Mr. Richmond did not begin employment with this employer until October 26, 2016, after the due date to appeal. It was when the claimant established her claim for a second benefit year, and a new notice of claim was mailed to the employer on April 18, 2017, that Mr. Richmond personally became aware of the October 2016 decision. Mr. Richmond asserted that due to Ms. Roberts' leave of absence and death, mail had been distributed but delegating of mail had been delayed while the employer attempted to fill Ms. Roberts' role and job duties. No one from the Overland Park office participated in the hearing.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the employer's appeal is untimely.

Iowa Code § 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, subsection 10, 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 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. Bd. of Adjustment*, 239 N.W.2d 873, 92 A.L.R.3d 304 (Iowa 1976).

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 unemployment insurance 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. Iowa Dep't of Job Serv.*, 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. Iowa Dep't of Job Serv.*, 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. Iowa Emp't Sec. Comm'n*, 217 N.W.2d 255 (Iowa 1974); *Smith v. Iowa Emp't Sec. Comm'n*, 212 N.W.2d 471, 472 (Iowa 1973). In this case, the employer's appeal was filed over six months after the deadline for appealing expired. The evidence presented by the employer does not support that the delay was due to either Agency error or an error by the United States Postal Service, which might under 871 IAC 24.35(2) excuse the delay in filing an appeal.

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.* Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has failed to establish a good cause reason for failure to timely appeal the October 13, 2016 decision.

The administrative law judge is sensitive to the employer's loss of its employee, Angie Roberts, but also must give Mr. Richmond's testimony the appropriate weight given that he was not employed for the employer during the period of time the notice of decision and prescribed appeal period. Mr. Richmond did not begin his employment until October 26, 2016, and the final day to appeal was October 23, 2016. Further, no witness with specific, first-hand knowledge of the handling of Ms. Roberts' mail and files attended the hearing to offer an explanation for why Ms. Roberts or someone on behalf of the employer did not appeal during the prescribed appeal period (before Mr. Richmond joined employment.)

Based on the evidence presented, the employer has failed to establish good cause reason for delaying the filing of the Appeal dated October 13, 2016 until May 2, 2017. The administrative law judge further concludes that the appeal was not timely filed pursuant to Iowa Code § 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. Iowa Dep't of Job Serv.*, 276 N.W.2d 373 (Iowa 1979) and *Franklin v. Iowa Dep't of Job Serv.*, 277 N.W.2d 877 (Iowa 1979).

DECISION:

The October 13, 2016, (reference 02) unemployment insurance decision is affirmed. The appeal in this case was not timely, and the decision of the representative remains in effect.

Jennifer L. Beckman
Administrative Law Judge

Decision Dated and Mailed

jlb/scn