IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JOHN F BAUMANN
Claimant

YMCA OF FOREST CITY IOWA
Employer

APPEAL NO: 11A-UI-16120-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 10/09/11
Claimant: Appellant (1)

Section 96.4-3 – Availability for Work
Section 96.3-3 – Eligibility for Partial Unemployment Insurance Benefits
Section 96.19-38-b – Eligibility for Partial Unemployment Insurance Benefits
871 IAC 23.43(4)(a) – Charges for Partial Unemployment Insurance Benefits
Section 96.6-2 – Timeliness of Appeal

STATEMENT OF THE CASE:

John F. Baumann (claimant) appealed a representative's November 2, 2011 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits as a result of his employment with YMCA of Forest City Iowa (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on January 17, 2012. The claimant participated in the hearing. Bruce Mielke appeared on the employer's behalf. During the hearing, Exhibit A-1 was entered into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Was the claimant's appeal timely or are there legal grounds under which it should be treated as timely? Was the claimant eligible for full or partial unemployment insurance benefits by being able and available for work? Is the employer's account subject to charge?

FINDINGS OF FACT:

The representative's decision was mailed to the claimant's last-known address of record on November 2, 2011. The claimant received the decision on or about November 4. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by November 12, 2011, a Saturday. The notice also provided that if the appeal date fell on a Saturday, Sunday, or legal holiday, the appeal period was extended to the next working day, which in this case was Monday, November 14. An appeal was not received the claimant hand-delivered an appeal to a local Agency office on December 14, 2011, which is after the date noticed on the disqualification decision. The claimant had written a prior appeal letter and deposited it into a United States Postal Service mail box within a few days after November 4.

The claimant started working for the employer on in January 1999. He worked and continues to work part time as a cleaning staff person. Until on or about October 12, 2010 the claimant had a primary full-time employer for which he worked a regular 8:00 a.m. to 3:30 p.m., Monday through Friday job; during that time, the claimant only worked about 12 to 15 hours per week for the employer. The claimant's full-time regular job with that employer, the Good Samaritan Society, ended on or about October 12, 2010, and the claimant established an initial unemployment insurance claim effective October 10, 2010. The Good Samaritan Society and this part-time employer were his only employers during his base period for that claim year, and he had wages from both employers in all four of the quarters of that base period (the third quarter 2009 through the second quarter 2010). He filed weekly claims for which he reported his wages from this part-time employer, and received partial unemployment insurance benefits until his benefit eligibility under that initial claim year was exhausted, and then received some emergency unemployment compensation (EUC) through the last week of his claim year, ending the week ending October 8, 2011.

The claimant was monetarily eligible for benefits in a second claim year, which was established effective October 9, 2011; this would mean that he would not be eligible for continued EUC benefits under the 2010 claim year. For the new regular claim year, the claimant still had wages from his prior regular employer in the first and second quarters of his base period (the third and fourth quarters of 2010), but only had wages from this part-time employer in the third and fourth quarters of the base period (the first and second quarters of 2011).

After the claimant's employment with his prior regular employment ended, he continued to work his part-time hours with this part-time employer; his hours increased slightly because of his increased availability. This is reflected in his wages earned with this employer, which went from roughly $300.00 per quarter in his first base period, to roughly $700.00 per quarter in his second base period.

REASONING AND CONCLUSIONS OF LAW:

The preliminary issue in this case is whether the claimant timely appealed the representative's decision. Iowa Code § 96.6-2 provides that unless the affected party (here, the claimant) files an appeal from the decision within ten calendar days, the decision is final and benefits shall be paid or denied as set out by 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 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 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 record shows that the appellant did not have a reasonable opportunity to file a timely appeal.

The administrative law judge concludes that failure to file a timely appeal within the time prescribed by the Iowa Employment Security Law was due to Agency error or misinformation or delay or other action of the United States Postal Service pursuant to 871 IAC 24.35(2), or other factor outside of the claimant's control. The administrative law judge further concludes that the appeal should be treated as timely filed pursuant to Iowa Code § 96.6-2. Therefore, the administrative law judge has jurisdiction to make a determination with respect to the nature of the appeal. See, *Beardslee*, supra; *Franklin*, supra; and *Pepsi-Cola Bottling Company v. Employment Appeal Board*, 465 N.W.2d 674 (Iowa App. 1990).

The substantive issue in this case is whether the claimant is eligible for partial unemployment insurance benefits and the employer's account is subject to charge in a second benefit year. A claimant is considered partially unemployed when the claimant has been separated or laid off from his "regular employer" and earns less than his weekly benefit amount plus $15.00 in other employment. Iowa Code § 96.19-38(b); see also Iowa Code § 96.3-3. The facts establish the claimant was separated from his regular job in October 2010. A claimant who is separated from his "regular employer" and continues his part-time job therefore is eligible to receive unemployment insurance benefits and as long as the claimant works the same hours he has always worked the part-time employer's account can be relieved from charge. However, this only applies to the first benefit year. If a claimant establishes a second benefit year claim, the part-time employer cannot be relieved from charge. 871 IAC 23.43(4).

The Agency has interpreted these sections in defining a "week of unemployment" as "a week in which an individual performs less than full-time work for any employing unit if the wages payable with respect to such week are less than a specified amount," which would be the partial earnings allowance described above. 871 IAC 24.1(138). Under 871 IAC 24.1(135)(c), "full-time week" is defined as "the number of hours or days per week of full-time work currently established by schedule, custom or otherwise for the kind of service an individual performs for an employing unit."

For the claim for the benefit year beginning October 10, 2010, the claimant's regular workweek was based upon working about 38 hours per week for the Good Samaritan Society plus working 12 hours per week for the employer during the period immediately preceding his separation from the Good Samaritan Society. In the present case for the benefit year beginning October 9, 2011, the claimant's regular workweek must be based upon his status as of the point he filed his claim for a second benefit year. The evidence indicates that at that point the claimant was working about 15 per week, which he has done since October 2010. This establishes the claimant's "regular workweek" for the current benefit year for determining whether he was partially unemployed under the statutes and rules.

The claimant is currently working full-time within his regular workweek for this current benefit year, and is not eligible for partial unemployment insurance benefits.

The administrative law judge is aware that on at least one occasion the Employment Appeal Board has taken a different approach. In a decision issued under 08A-UI-0966, *Clemon vs. Municipal Credit Union*, the Board considered a similar situation and reasoned that since there

is a provision that a person who quits part time employment can remain eligible to receive unemployment insurance benefits if she has sufficient base period wages from another employer, presumably even in a second claim year, that a person who does not quit her part-time employment in a second claim year should not be penalized for keeping that part-time employment and be denied partial unemployment insurance benefits. The Board stated, "In short, basic fairness requires this Claimant to have at least as much right to collect (partial) benefits as a claimant [who has quit part time employment]. We therefore hold that if the Claimant has adequate wage credits from her prior employers . . . she [is] eligible to receive some benefits based on those accounts." The Board concluded that the employer's account would still be exempt from charge, and that the claimant's weekly benefit amount would need to be reduced to discount the wage credits earned from the part-time employer.

While this result is tempting, the administrative law judge fails to find statutory or regulatory support for this reasoning. Regardless of the perceived inequities of the situation, the administrative law judge does not have discretion to rule contrary to the law; the administrative law judge does not possess equitable authority. *Lenning v. Iowa Dept. of Transp*, 368 N.W.2d 98 (Iowa 1985).

DECISION:

The appeal in this case is treated as timely. The unemployment insurance decision dated November 2, 2011 (reference 01) is affirmed. The claimant is not eligible for partial unemployment insurance benefits in his second benefit year effective October 9, 2011.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

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