**IOWA WORKFORCE DEVELOPMENT**
**UNEMPLOYMENT INSURANCE APPEALS**

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

**ANDREW R MARSH**
Claimant

**AMERICAN CONCRETE PUMPING INC**
Employer

**APPEAL NO: 09A-UI-17755-DT**

**ADMINISTRATIVE LAW JUDGE DECISION**

**OC: 08/16/09**
**Claimant: Appellant (1)**

Section 96.5-1 – Voluntary Leaving
Section 96.6-3 – Postponements
Section 96.6-2 - Timeliness of Appeal

**STATEMENT OF THE CASE:**

Andrew R. Marsh (claimant) appealed a representative's September 16, 2009 decision (reference 05) that concluded he was not qualified to receive unemployment insurance benefits after a June 8, 2009 separation from employment from American Concrete Pumping, Inc. (employer). Hearing notices were mailed to the parties' last-known addresses of record for a telephone hearing to be held at 10:00 a.m. on January 6, 2010. This appeal was consolidated for hearing with one related appeal, 09A-UI-17756-DT. The claimant received the hearing notice and responded by calling the Appeals Section on December 2, 2009. He indicated that he would be available at the scheduled time for the hearing at a specified telephone number. However, when the administrative law judge called that number at the scheduled time for the hearing, the claimant was not available to participate in the hearing as he had obtained a new job and was driving truck, and could not stay parked in order to participate in the hearing. The claimant requested but the administrative law judge denied his request to reschedule the hearing; therefore, the claimant did not participate in the hearing. The employer responded to the hearing notice and indicated that Tanya Hawker would participate as the employer's representative. When the administrative law judge contacted Ms. Hawker for the hearing, she agreed that the administrative law judge should make a determination based upon a review of the information in the administrative file.

**ISSUES:**

Was the claimant's request for a postponement properly denied? Was the claimant's appeal timely or are there legal grounds under which it can be treated as timely?

**FINDINGS OF FACT:**

The parties were properly notified of the scheduled hearing on this appeal. The claimant/appellant failed to be actively available at the scheduled day and time set for the hearing and did not participate in the hearing. When he received the call for the hearing he made a late request for postponement of the hearing. He had not previously requested a postponement of the hearing because when he received the offer of new employment on or

about January 1, 2010 he determined that was more important than participation in the hearing and did not consider the possibility of seeking to have the hearing rescheduled to some time when he could actively participate in the hearing.

The representative's decision was mailed to the claimant's last-known address of record on September 16, 2009. No evidence was provided to rebut the presumption that the claimant received the decision within a few days thereafter. The decision specified that if the decision denied benefits and was not reversed on appeal, it could result in an overpayment which the claimant would be required to repay. The decision further contained a warning that an appeal must be postmarked or received by the Appeals Section by September 26, 2009, 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, September 28. The appeal was not filed until it was postmarked on November 24, 2009, which is after the date noticed on the disqualification decision. The appeal was not made until issuance of an overpayment decision on November 17, 2009 (reference 08), which resulted from the September 16, 2009 disqualification decision. The claimant's appeal of the resulting overpayment decision is the subject of the concurrently issued decision in 09A-UI-17756-DT. No other explanation for the delay in the filing of the appeal was provided.

**REASONING AND CONCLUSIONS OF LAW:**

The first issue which must be addressed is whether the claimant's request for postponement of the hearing at the scheduled time for the hearing should have been granted. While reasonable requests for postponement can be granted, good cause must be shown, and at least absent extraordinary emergency situations, a request is to be made within three business days prior to the hearing. Iowa Code § 96.6-3; 871 IAC 26.8(2). The claimant did not request the postponement within three days prior to the hearing, and while the reason for the request was a good personal reason, it was not shown to be of such an emergency nature as would excuse a failure to have made a timely request for a postponement. The claimant's late request to postpone the hearing was properly denied.

Turning to the issue of the timing of the claimant's appeal, if a party fails to make a timely appeal of a representative's decision and there is no legal excuse under which the appeal can be deemed to have been made timely, the decision as to the merits has become final and is not subject to further review. 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 then 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).

A party does not have a reasonable opportunity to file a timely appeal if the delay is due to Agency error or misinformation or to delay or other action of the United States postal service. 871 IAC 24.35(2). Failing to read and follow the instructions for filing an appeal is not a reason outside the appellant's control that deprived the appellant from having a reasonable opportunity to file a timely appeal. The appellant did have a reasonable opportunity to file a timely appeal.

The administrative law judge concludes that failure to file a timely appeal within the prescribed time was not due to a legally excusable reason so that it can be treated as timely. The administrative law judge further concludes that because the appeal was not timely, the administrative law judge lacks jurisdiction to make a determination with respect to the nature of the appeal, regardless of whether the merits of the appeal would be valid. See, Beardslee, supra; Franklin, supra; and Pepsi-Cola Bottling Company v. Employment Appeal Board, 465 N.W.2d 674 (Iowa App. 1990).

**DECISION:**

The representative's September 16, 2009 decision (reference 05) is affirmed. The appeal in this case was not timely, and the decision of the representative has become final and remains in full force and effect. Benefits are denied as of June 8, 2009 until such time as the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided the claimant is then otherwise eligible.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

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