

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CRAIG A EWING
Claimant

APPEAL NO. 11A-UI-04252-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

KUM & GO LC
KUM & GO
Employer

OC: 10/18/09
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Craig Ewing filed an appeal from the November 30, 2009, reference 01, decision that denied benefits effective October 18, 2009, based on an Agency conclusion that he was still employed with Kum & Go under the same hours and wages and could not be considered partially unemployment from that employment. After due notice was issued, a hearing was held by telephone conference call on April 27, 2011. Mr. Ewing participated. Rhonda Rich, Store Manager, represented the employer. The hearing in this matter was consolidated with the hearing in Appeal Number 11A-UI-04253-JTT. Department Exhibits D-1 through D-4 were received into evidence. The administrative law judge took official notice of the Agency's administrative record of wages reported by the claimant and benefits disbursed to the claimant for the week ending October 24, 2009.

ISSUE:

Whether there is good cause under the law to deem Mr. Ewing's appeal from the November 30, 2009, reference 01, decision a timely appeal.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Craig Ewing established a claim for unemployment insurance benefits that was effective October 18, 2009. Mr. Ewing established the claim in response to a short-term layoff from his full-time employment at Electrolux. At the time, Mr. Ewing also had part-time employment at Kum & Go. Mr. Ewing claimed unemployment insurance benefits for the week that ended October 24, 2009. For that week, Mr. Ewing reported \$129.00 in wages from the part-time employment from Kum & Go. For that week, Workforce Development disbursed \$338.00 in regular benefits and an additional \$25.00 in federal stimulus benefits. The total benefits disbursed to Mr. Ewing for the week that ended October 24, 2009 was \$363.00. On November 25, 2009, a Workforce Development representative conducted a telephonic fact-finding interview to discuss with Mr. Ewing and Kum & Go the issue of whether Mr. Ewing was able & available for work. The

employer participated in the fact-finding interview, but Mr. Ewing did not. Mr. Ewing had returned to work at Electrolux.

On November 30, 2009, Iowa Workforce Development mailed a copy of the November 30, 2009, reference 01, decision to Mr. Ewing's last-known address of record. The decision resulted from the November 25 fact-finding interview. The decision concluded that Mr. Ewing was ineligible for benefits effective October 18, 2009 because he could not be deemed partially unemployed from Kum & Go. The weight of the evidence indicates that Mr. Ewing received the decision in a timely manner, prior to the deadline for appeal, but did not take steps to file an appeal from the decision at that time. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by December 10, 2009. Mr. Ewing's knowledge and receipt of November 30, 2009, reference 01, decision is confirmed by the steps he took in January and/or February 2010 to obtain the February 9, 2010, reference 02, decision that found him available for work effective January 17, 2010 and that allowed him to again begin receiving unemployment insurance benefits.

On March 29, 2011, Workforce Development mailed a reference 03 overpayment decision to Mr. Ewing. The decision said that Mr. Ewing was overpaid \$363.00 in benefits for the week ending October 24, 2009 because of the decision entered on November 30, 2009. Mr. Ewing received the overpayment decision on April 3, 2011. On April 4, 2011, Mr. Ewing went to the Webster City Workforce Development Center, completed and appeal form, and delivered the completed form to the Workforce Development staff. The Webster City Workforce Development staff faxed the appeal to the Appeals Section. The Appeals Section received the appeal on April 4, 2011 and treated it as an appeal also from the November 30, 2009, reference 01 disqualification decision.

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, 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-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 appeal in this matter was filed on April 4, 2011, the date on which Mr. Ewing delivered the completed appeal to Workforce Development and the date on which the Appeal Section received the appeal by fax.

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 record shows that the appellant did have a reasonable opportunity to file a timely appeal.

No appeal shall be considered timely if the delay in filing was unreasonable, as determined by the division after considering the circumstances in the case. See 871 IAC 24.35(2)(c).

The evidence establishes that Mr. Ewing waited from December 2009 to April 2011, 16 months to file an appeal from the November 30, 2009, reference 01 decision. The delay was unreasonable.

The administrative law judge concludes that Mr. Ewing's failure to file a timely appeal from the November 30, 2009, reference 01 decision within the time prescribed by the Iowa Employment Security Law was not due to any Workforce Development error or misinformation or delay or other action of the United States Postal Service. See 871 IAC 24.35(2). The administrative law judge further concludes that the appeal was not timely filed pursuant to Iowa Code section 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. IDJS, 276 N.W.2d 373 (Iowa 1979) and Franklin v. IDJS, 277 N.W.2d 877 (Iowa 1979).

DECISION:

The Agency representative's November 30, 2009, reference 01, disqualification decision is affirmed. The appeal in this case was not timely, and the decision of the representative remains in effect. The claimant was not eligible for benefits for the period of October 18, 2009 through January 16, 2010.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css