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

MICHAEL E BUSHMAN
Claimant

CITY OF AMES
Employer

APPEAL NO. 07A-UI-07999-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 06-24-07   R: 02
Claimant: Appellant (1)

Section 96.6(2) – Timeliness of Appeals

STATEMENT OF THE CASE:

Mr. Bushman filed an appeal from a representative's decision dated August 3, 2007, reference 02, which held him ineligible to receive unemployment insurance benefits. After due notice was issued, a hearing was held by telephone on September 6, 2007. Mr. Bushman participated personally. The employer participated by Mr. Keith Abraham.

ISSUE:

At issue in this matter is whether the appeal filed herein was timely.

FINDINGS OF FACT:

The administrative law judge, having considered all of the evidence in the record, finds that: A disqualification decision was mailed to the claimant's last-known address of record on August 3, 2007. The claimant received the decision. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by August 13, 2007. The appeal was not filed until August 21, 2007, which is after the date noticed on the disqualification decision. The claimant after receiving the decision contacted the Workforce Development Center to discuss the disqualification that he disagreed with. After considering the matter for a number of days, the claimant then filed an appeal, however, it was beyond the ten day statutory time limitation.

REASONING AND CONCLUSIONS OF LAW:

 REF 22

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 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.

The administrative law judge concludes that failure to file a timely appeal within the time prescribed by the Iowa Employment Security Law was not due to any Agency error or misinformation or delay or other action of the United States Postal Service pursuant to 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 representative's decision dated August 3, 2007 reference 02 , is hereby affirmed. The appeal in this case was not timely and the decision of the representative remains in effect.

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Terence P. Nice
Administrative Law Judge

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Decision Dated and Mailed

tpn/css