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

JACQUELYN C WICKS
Claimant

APPEAL NO. 13A-UI-06451-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WEAVER ENTERPRISES LTD
Employer

**OC: 04/14/13
Claimant: Respondent (1)**

Iowa Code Section 96.6(2) – Timeliness of Protest
Iowa Code Section 96.6(2) – Timeliness of Appeal

STATEMENT OF THE CASE:

The employer filed an appeal from the May 15, 2013, reference 03, decision that allowed benefits and that concluded the employer's protest was untimely. After due notice was issued, a hearing was held on July 8, 2013. Claimant Jacquelyn Wicks did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Terry Moffit represented the employer and presented additional testimony through Sherry Walters. Exhibit One was received into evidence.

ISSUE:

Whether there is good cause to treat the employer's late appeal as a timely appeal.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: On May 15, 2013, Iowa Workforce Development mailed copy of the May 15, 2013, reference 03 decision to the employer's last-known address of record. The employer received the decision in a timely manner, prior to the deadline for appeal. The decision carried a warning that any appeal from the decision had to be postmarked by May 25 2013 or received by the Unemployment Insurance Appeals Bureau by that date. The decision also said that if the appeal deadline fell on a Saturday, Sunday, or legal holiday, the deadline would be extended to the next working day. May 25, 2013, was the Saturday that preceded Memorial Day. The next working day was Tuesday, May 28, 2013. On May 30, 2013, Sherry Walters, Payroll Manager, drafted the employer's appeal comments on the employer's copy of the May 15, 2013, reference 03, decision. Ms. Walters then faxed the decision, along with a copy of the employer's protest document, to the Appeals Section. The Appeals Section received the employer's appeal on May 30, 2013.

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 employer's appeal from the May 15, 2013, reference 03, decision was filed on May 30, 2013, when the Appeals Section received the faxed appeal.

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. During the hearing, Ms. Walters could not say when the employer received the decision, who handled it before it was forwarded to her, how long the employer had the document before forwarding it to Ms. Walters, or how long she had it before she prepared an appeal. The weight of the evidence indicates the employer received the decision in a timely manner, but failed to act on filing an appeal until two days after the extended deadline for the appeal had passed. Because of the weekend and the holiday, the employer had three more days beyond the statutory 10 days from the mailing date of the decision in which to file an appeal.

The administrative law judge concludes that the employer's 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. 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 employer's appeal was untimely. The Agency representative's May 15, 2013, reference 03, decision is affirmed. The lower decision that found the employer's protest untimely remains in effect.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs