IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

NATHAN D BECKER
4518 HARRISON ST
SIOUX CITY IA 51108

PEPSICO INC - FRITO-LAY INC
DBA ROLLING FRITO-LAY SALES LP
C/O TALX UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 04A-UI-06164-RT
OC: 05-09-04 R: 01
Claimant: Respondent (1)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the ***Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319***.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

Section 96.6-2 – Initial Determination (Timeliness of Appeal)

STATEMENT OF THE CASE:

The employer, Pepsico, Inc. - Frito-Lay, Inc., doing business as Rolling Frito-Lay Sales LP, filed an appeal from an unemployment insurance decision dated May 21, 2004, reference 01, allowing unemployment insurance benefits to the claimant, Nathan D. Becker. After due notice was issued, a telephone hearing was held on June 22, 2004 with the claimant participating. The employer did not participate in the hearing because the employer did not call in a telephone number, either before the hearing or during the hearing, where any witnesses could be reached for the hearing, as instructed in the notice of appeal. The employer was represented by TALX UC eXpress, which is well aware of the need to call in a telephone number in advance of the hearing if the employer wants to participate in the hearing. The administrative law judge takes

official notice of Iowa Workforce Development Department unemployment insurance records for the claimant. Department Exhibit 1 was admitted into evidence.

FINDINGS OF FACT:

Having heard the testimony of the witness and having examined all of the evidence in the record, including Department Exhibit 1, the administrative law judge finds: An authorized representative of Iowa Workforce Development issued a decision in this matter on May 21, 2004, reference 01, determining that the claimant was eligible to receive unemployment insurance benefits because records indicate he was dismissed from work on May 7, 2004 for alleged misconduct but the employer did not furnish sufficient evidence to show misconduct. This decision was sent on the same date to the employer's representative, TALX UC eXpress, at the same address as shown on the appeal. This decision indicated that an appeal had to be postmarked or otherwise received by the Appeals Section by June 1, 2004 (the decision actually said May 31, 2004 but since this was Memorial Day the appeal would be due the next working or business day). As shown by Department Exhibit 1, the employer's appeal was faxed to Iowa Workforce Development on June 2, 2004, one day late. The appeal itself is dated June 2, 2004. Neither the employer nor its representative participated in the hearing to provide reasons why the appeal was late.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the employer filed a timely appeal or, if not, whether the employer demonstrated good cause for such failure. The employer's appeal was not timely and the employer did not demonstrate good cause for a delay in filing its appeal and, as a consequence, the employer's appeal should not be accepted and the administrative law judge has no jurisdiction to reach the remaining issues.

2. Whether the claimant's separation from employment was a disqualifying event. The administrative law judge does not have jurisdiction to reach that issue.

3. Whether the claimant is overpaid unemployment insurance benefits. The administrative law judge does not have jurisdiction to reach that issue.

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 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).

(1) The record shows that the appellant did have a reasonable opportunity to file a timely appeal.

The administrative law judge concludes that the employer has the burden to prove that its appeal was timely or that it had good cause for the delay in the filing of its appeal. The administrative law judge concludes that the employer has not met its burden of proof to demonstrate by a preponderance of the evidence either that its appeal was timely or that it had good cause for the delay in the filing of its appeal. On its face, the employer's appeal is one day late as noted in the findings of fact. The decision from which the employer sought to appeal was mailed to the same address for its representative as is shown in the employer's appeal. Neither the employer nor its representative participated in the hearing to provide reasons why the employer's appeal was late. Accordingly, the administrative law judge concludes that the employer's attempted appeal of the decision dated May 21, 2004, reference 01, is not timely and the employer has not demonstrated good cause for the delay in the filing of its appeal. Therefore, the administrative law judge concludes that the appeal should not be accepted and that he lacks jurisdiction to make a determination with respect to the other issues

presented. The administrative law judge finally concludes that the representative's decision of May 21, 2004, reference 01, should remain in full force and effect.

DECISION:

The representative's decision of May 21, 2004, reference 01, is to remain in full force and effect. The claimant, Nathan D. Becker, is entitled to receive unemployment insurance benefits, provided he is otherwise eligible. The employer's attempted appeal is not timely and the employer has not demonstrated good cause for a delay in the filing of its appeal.

tjc/tjc